

**NSLPP MEETING HELD ON 06/12/23****Attachments:**

1. Site Plan
2. Architectural Plans
3. Clause 4.6 Height of Buildings

**ADDRESS/WARD:** Unit 9, 17 Wyagdon Street, Neutral Bay (C)**APPLICATION No:** DA 242/23 (PAN-355107)**PROPOSAL:** Construction of semi-enclosed pergola and replacement of balustrades within a roof terrace of an existing unit (Unit 9) within a residential flat building.**PLANS REF:**

| Plan No. | Revision | Description               | Prepared by       | Dated      | Received   |
|----------|----------|---------------------------|-------------------|------------|------------|
| DA01     | A        | Site Plan                 | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA02     | A        | Proposed Floor Plan       | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA03     | A        | Proposed Roof Plan        | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA04     | A        | Proposed Elevations       | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA05     | A        | Proposed Sections 01 & 02 | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA06     | A        | Proposed West Elevation   | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA07     | A        | Proposed South Elevation  | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA08     | A        | Proposed East Elevation   | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA12     | A        | Materials and Finishes    | COSO Architecture | 21/11/2023 | 23/11/2023 |

**OWNER:** SP20922, Lot 9 - Lawrence Field and Marian Pereira**APPLICANT:** COSO Architecture**AUTHOR:** Andrew Beveridge, Senior Assessment Officer**DATE OF REPORT:** 23 November 2023**DATE LODGED:** 14 August 2023**AMENDED:** 15 September 2023; 23 November 2023**SUBMISSIONS:** Nil**RECOMMENDATION:** Approval

## EXECUTIVE SUMMARY

This development application seeks NSLPP approval for the addition of an enclosed pergola and replacement balustrades to the existing rooftop terrace of Unit 9, an existing two-bedroom unit within an existing residential flat building at 17 Wyagdon Street, Neutral Bay.

**The application is reported to the North Sydney Local Planning Panel for determination as the application relates to SEPP 65 development, seeking a variation to a development standard by more than 10% and creates additional height to the building.**

Development for the purpose of a residential flat building is not permitted within the R2 Low Density Residential zone. However, it is considered that the subject site benefits from existing use rights on the basis of North Sydney Council's original approval from 1980.

The proposed development breaches the maximum permitted building height of 8.5m by approximately 9.84m, equating to a maximum variation of 1.34m or 15.7%. The applicant's submission has been considered with reference to the Land and Environment Court's decision in *Wehbe v Pittwater Council [2007] NSWLEC 827* in order to justify the proposed variation. The applicant's submission has been considered with reference to the Land and Environment Court's decision in *Wehbe v Pittwater Council [2007] NSWLEC 827* in order to justify the proposed variation. The applicant's Clause 4.6 is considered to be satisfactory given the site circumstances and on the basis that it will not have a significant impact upon the views or general amenity of adjoining properties.

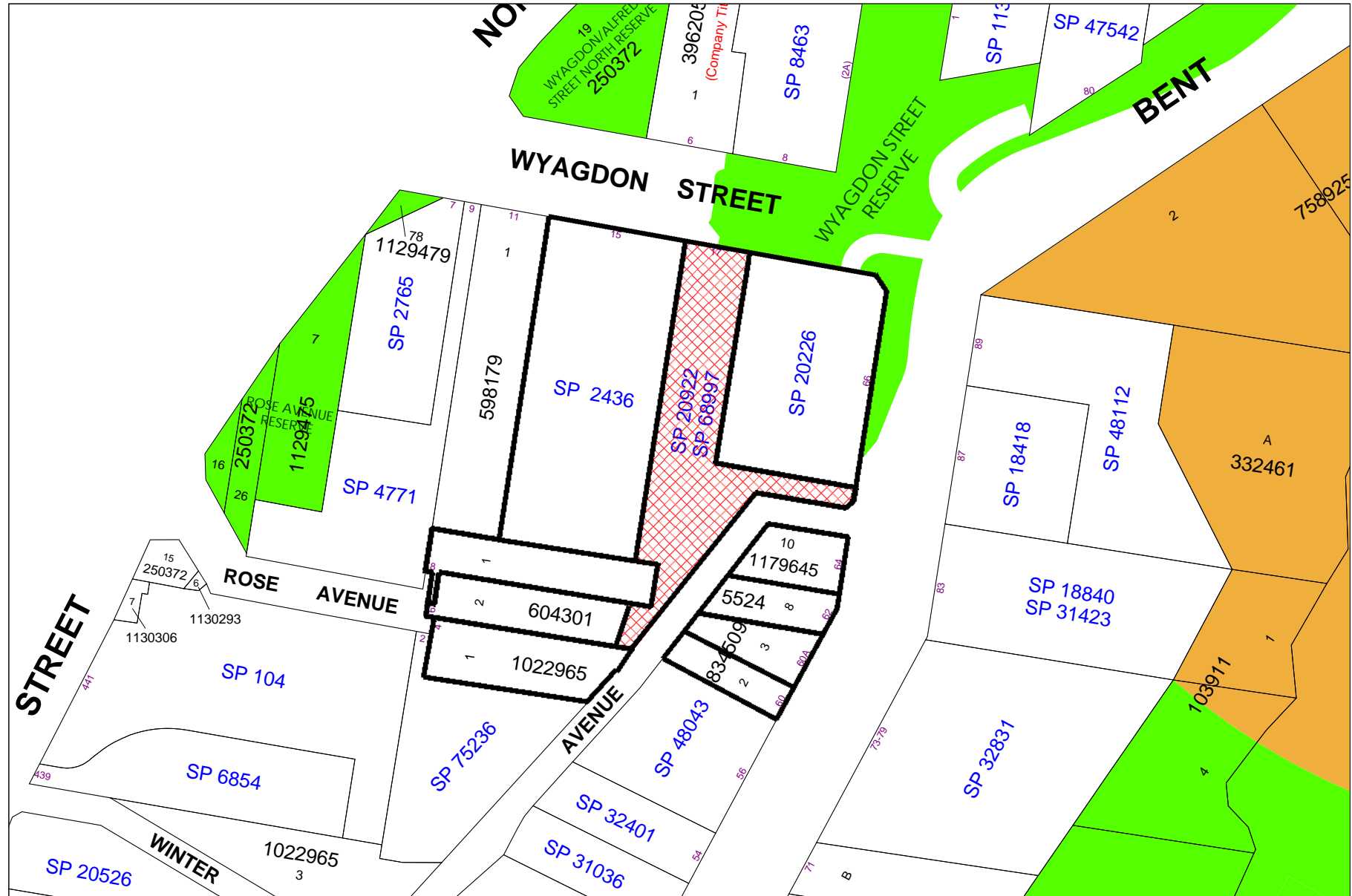
The application was notified in accordance with the community engagement protocol and Council received no submissions. The amenity impacts upon adjoining properties in regard to views, solar access, and privacy, have been assessed and are considered to be relatively minor and acceptable within the site circumstances. The works will also maintain a sympathetic scale that is consistent with the existing building and accords with the built form of the neighbourhood and the sloping topography of the site.

Subject to the satisfaction of conditions, it is considered that the proposal is acceptable as it will not result in any significant adverse impacts upon the locality or adjoining properties, and the streetscape character will be maintained.

Nevertheless, the proposed development would not be in the public interest as the submitted written request is not considered to be well founded and worthy of support.

Having regard for the potential impacts upon the amenity of adjoining properties and the surrounding neighbourhood, subject to conditions, the development application is considered to be satisfactory and is recommended for **approval**.

LOCATION MAP



□ Property/Applicant ● Submitters - Properties Notified

## DESCRIPTION OF PROPOSAL

The development application seeks consent for the construction of an enclosed pavilion on an existing roof terrace of an apartment within a residential flat building, relying on existing use rights.

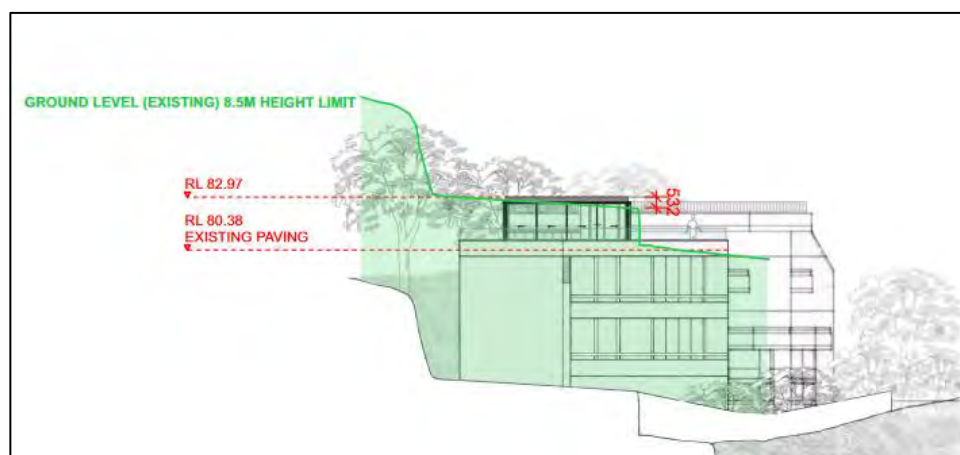
The proposed works include:

### Existing Roof Terrace (RL 80.38)

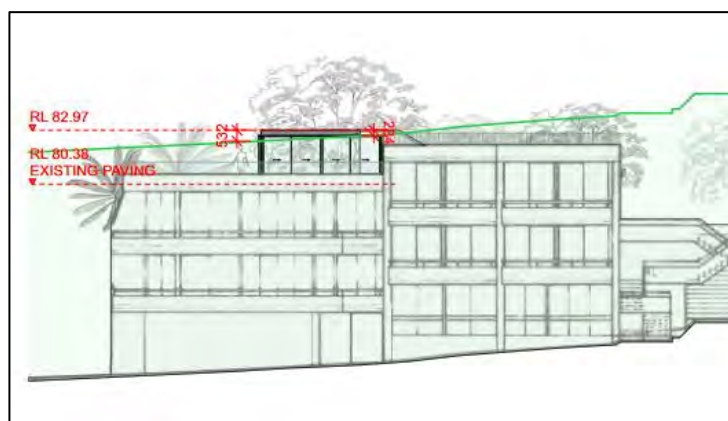
- Addition of an enclosed metal framed pergola structure to the existing roof terrace connected to the existing stair access door. The pergola includes sliding glass doors to its sides and a glass roof with operable metal louvres on top.
- Addition of a kitchen and bench area within the pergola, and an addition bench and storage to the east of the pergola on the outdoor roof terrace.
- Additional paving paid over the top of the existing roof terrace paving, with existing drainage retained.
- Replacement of the existing metal palisade balustrades to the roof terrace with glazed balustrades.



**Figure 1. Proposed Roof Terrace Plan**



**Figure 2. Proposed Southern Elevation**



**Figure 3. Proposed Eastern Elevation**

## STATUTORY CONTROLS

### *North Sydney Local Environmental Plan 2013*

- Zoning – R2 Low Density Residential zone
- Item of Heritage – No
- In Vicinity of Item of Heritage – Yes (I0735 “house, sandstone rock wall and cliff face”)
- Conservation Area – No

### *Environmental Planning and Assessment Act 1979*

### *SEPP No. 65 – Design Quality of Residential Flat Development & Apartment Design Guide*

### *SEPP (Sustainable Buildings) 2022*

### Local Development

## POLICY CONTROLS

### *North Sydney Development Control Plan 2013 (NSDCP 2013)*

- Bushland Buffer – Buffer Area A (100m)

### *North Sydney Local Infrastructure Contributions Plan 2020*

## DESCRIPTION OF LOCALITY

The subject site is legally described as SP 20922 and is known as 17 Wyagdon Street, Neutral Bay. The site is located on the southern (low) side of Wyagdon Street to the east of Alfred Street North.

The site is generally rectangular in shape except for the southern end of the site which is irregular shape bordering Winter Avenue to the southeast. The site has a 13.66m frontage to Wyagdon Street and a depth of approximately 70m, equating to a site area of 1,278.20sqm. The site is located on the escarpment above Winter Avenue. There is a 20m high retaining wall / cliff wall along the southeastern boundary.

The site contains a substantial residential flat building originally approved in 1980 that runs along almost the entire length of the site, and contains 10 individual units. The subject Unit 9 is located at the southern end of the site and spans three floors of the development, including a substantial roof terrace space that has sweeping water views over Neutral Bay and Sydney Harbour.



Figure 4. Aerial Image of the subject site and surrounds.

The site is zoned R2 Low Density Residential, with a maximum height limit of 8.5m. The surrounding land, except for the lots to the south at the end of Rose Avenue, is zoned R4 High Density Residential.

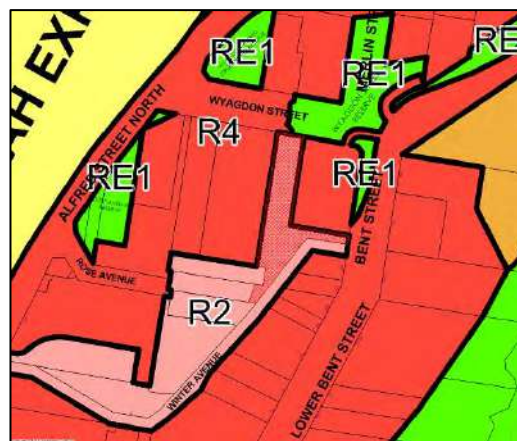


Figure 5. NSLEP 2013 Land use zoning map with the subject site shown outlined in yellow.

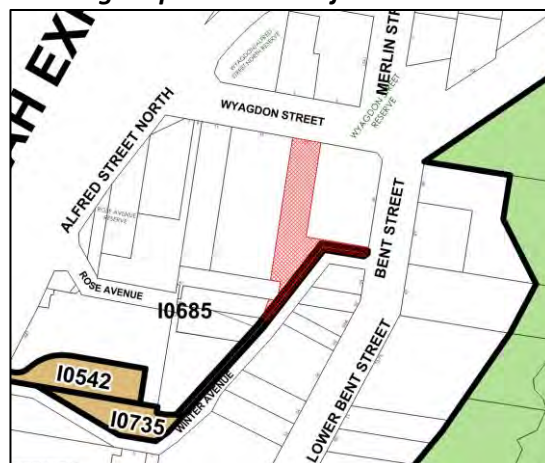


Figure 6. NSLEP 2013 Schedule 5 Heritage items (gold)



**Figure 7. NSLEP 2013 Height of Buildings maps within the subject site shown hatched in red.**

Additional photos of the subject site and surrounding area are provided below.



**Figure 8. View looking north across the roof terrace of Unit 9.**



**Figure 9. View looking west across the roof terrace of Unit 9.**



**Figure 10. View looking south across the roof terrace of Unit 9.**



**Figure 11. View of the subject site from Lower Bent Street.**

## RELEVANT DEVELOPMENT HISTORY

**Building Application No. 79/691** for the demolition of the existing brick dwelling on site and the construction of a 10-unit residential flat building comprising three storeys with basement parking, was approved by Council on 2 January 1980. Peter Duffield & Associates, architects. The building was strata subdivided under SP 20922 on 8 February 1984.

**Development Application No. 1650/95** (lodged 28 December 1995) for the extension of Unit 7 within the existing building footprint, was approved by Council on 27 March 1996. Building works were approved under **Building Application No. 95/874** on 4 July 1996.

**Development Application No. 591/01** (lodged 23 May 2001) for an amended strata subdivision of the existing building was approved by Council on 26 July 2001.

**Development Application No. 187/23** (lodged 6 June 2023) for the same works as proposed to Unit 9 was rejected by Council on 15 June 2023, due to a lack of strata owners' consent, a 4.6 statement that did not address the height control, and plans that did not show the height controls.

## RELEVANT APPLICATION HISTORY

| Date              | Assessment   |
|-------------------|--|
| 14 August 2023    | The subject application was lodged with Council via the NSW Planning Portal.   |
| 16 August 2023    | The application was notified in accordance with Council's Community Engagement Protocol from 25 August 2023 to 8 September 2023  |
| 18 August 2023    | A 'Stop the Clock' letter was sent to the applicant requesting a revised SEE and Clause 4.6, a survey and amended plans.   |
| 22 August 2023    | A site inspection was undertaken by Council Assessment Staff.  |
| 15 September 2023 | Amended plans and documentation were provided to Council in response to Council's letter.  |
| 9 October 2023    | Following completion of a review of the documentation, a letter was sent to the applicant, raising concern regarding the validity and comprehensiveness of the 4.6 statement, existing use rights assessment, and shadow diagrams. It was requested that the application be withdrawn within 7 days, or it would be refused. No withdrawal request was received. |
| 23 November 2023  | Follow consultations with Council Officers, the applicant submitted the previously requested information and amended plans to Council's satisfaction. These did not require renotification.  |

## REFERRALS

### Building

The proposed works that are the subject of this application have not been assessed in accordance with compliance with the National Construction Code of Australia. This would need to be undertaken prior to the issue of a Construction Certificate. Should significant changes be required to achieve compliance with NCC/BCA standards, a Section 4.55 application would be necessary.



## **Heritage**

The application was referred to Council's Heritage Conservation Planner as the subject site is located within proximity to a heritage item, I0735 ("house, sandstone rock wall and cliff face"). The proposed development would not detract from the heritage significance of the heritage item, and no special heritage conditions were required.

## **SUBMISSIONS**

The development application was notified in accordance with Council's Community Engagement Protocol from 25 August 2023 until 8 September 2023. No submissions were received.

## **CONSIDERATION**

### ***Environmental Planning and Assessment Act 1979***

The relevant matters for consideration under section 4.15(1) of the *Environmental Planning and Assessment Act 1979*, are assessed under the following headings:

#### ***State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development***

The proposed development involves minor alterations and additions to one of the units that comprise the residential flat building. In this respect, it is considered that the proposal is not subject to the provisions of the SEPP because the SEPP applies to substantial redevelopment or refurbishment of an existing residential flat building in accordance with Section 4(1)(ii) of the Policy.

#### ***State Environmental Planning Policy (Sustainable Buildings) 2022***

On 1 October 2023, the *SEPP (Sustainable Buildings) 2022* came into effect, which repealed the *SEPP (Building Sustainability Index: BASIX) 2004*. However, as this application was submitted prior to 1 October, the new BASIX standards do not apply. While the majority of the works to the rooftop terrace are considered BASIX Exempt Development as defined in Schedule 7 of the *Environmental Planning and Assessment Regulation 2021*, the pergola structure is not considered to be exempt as it is a space that can be fully enclosed by virtue of the sliding glass doors and glass roof of the structure.

Nevertheless, the works are not required to submit a BASIX Certificate as the works are less than \$50,000 (\$48,000), which classifies the pergola works as BASIX Optional Development.

#### ***North Sydney Local Environmental Plan 2013***

### **Permissibility**

The subject site is zoned R2 Low Density Residential in accordance with the NSLEP 2013. In accordance with the definitions for NSLEP 2013, the subject building can be defined as a residential flat building because it contains three or more dwellings. Residential flat buildings, however, are not a permissible form of development in an R2 Low Density Zone. Nevertheless, the subject site is considered to operate under existing use rights pursuant to sections 4.65-4.70 of the *Environmental Planning and Assessment Act 1979 (EPAA 1979)*.

Council granted consent for the construction of the existing residential flat building development of six units under Building Application No. 79/691 on 2 January 1980. Council has also approved previous alterations and additions to the subject development in 1995 and 2001 under previous planning instruments. Having regard to previous approvals where the proposals were permissible forms of development but now prohibited under *NSLEP 2013*, and the fact that the subject site has been lawfully occupied as a residential flat building since at least 1980, it can be concluded that the site benefits from “Existing Use Rights” under the *EPAA 1979* (as amended).

The subject application is therefore assessed under the relevant clauses in the *EPAA 1979* below:

***4.66 Continuance of and limitations on existing use***

- 1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.***
- 2) Nothing in subsection (1) authorises:***
  - (a) any alteration or extension to or rebuilding of a building or work, or***
  - (b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or***
  - (c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or***
  - (d) the continuance of the use therein mentioned in breach of any consent in force under this Act in relation to that use or any condition imposed or applicable to that consent or in breach of any condition referred to in section 80A (1) (b), or***
  - (e) the continuance of the use therein mentioned where that use is abandoned.***
- 3) Without limiting the generality of subsection (2) (e), a use is to be presumed, unless the contrary is established, to be abandoned if it ceases to be actually sused for a continuous period of 12 months.***

A search of Council’s records has revealed that the subject multi-dwelling housing development has been in continuous use for this purpose since 1980 and has not been abandoned for any length of time.

Sections 163-165 of the *Environmental Planning and Assessment Regulations 2021* are relevant to the proposed development because they set out how development is allowed under Part 7 (Existing uses). The relevant matters for consideration for existing uses and the consent requirements for alteration and additions to an existing use are considered below.

***Section 163 - Certain development allowed***

***(1) An existing use may, subject to this Part –***

- (a) be enlarged, expanded, or intensified, or***
- (b) be altered or extended, or***
- (c) be rebuilt, or***
- (d) be changed to another use, but only if the other use is a use that may be carried out with or without development consent under the Act,***

**Comment:** The proposal involves alterations and additions to an existing residential flat building that is permitted by Section 163(1) of the *EP&A Regulations 2021* for the reasons stated throughout this report.

**Section 164 - Enlargement, expansion, and intensification of existing uses**

- (1) Development consent is required for any enlargement, expansion or intensification of an existing use.**
- (2) The enlargement, expansion or intensification must be—**
  - (a) for the existing use and for no other use, and**
  - (b) carried out only on the land on which the existing use was carried out immediately before the relevant day.**

**Comment:** With regard to Section 164(2), the proposal for alterations and additions to the existing residential flat building satisfies the requirements for this clause because the proposal would be carried out on the land to which the existing use was carried out and no new uses would be introduced within the land affected by the proposal.

**Section 165 - Alterations of buildings and works**

- (1) Development consent is required for an alteration of a building or work used for an existing use.**
- (2) The alteration must be -**
  - (a) for the existing use of the building or work and for no other use, and**
  - (b) erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant day.**

**Comment:** The proposed works would be for the existing residential use of the building and there would be no other uses incorporated in the building.

**Land and Environment Court Planning Principles – Existing Use Assessments and Prescriptive Requirements**

Notwithstanding the above issues relating the permissibility and whether the site benefits from existing use rights, should the site indeed benefit as such, the decision of Chief Judge Preston in *Saffioti v Kiama Council* [2019] NSWLEC 57 outlined that the development standards would not derogate from the incorporated provisions of existing use rights and therefore would not prevent their operation. The decisions effectively overturned the Planning Principle established in *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71.

On this basis, the proposed development should comply with any development standard or be subject to a written request to vary the development standard pursuant to clause 4.6 in NSLEP 2013. In addition, it also concluded that the proposed development should be assessed against the relevant DCP provisions as a DCP is not an environmental planning instrument and therefore could not derogate from the incorporated provisions.

Therefore, any future development on the subject site must have regard to the relevant development standards and controls as contained in the LEP and DCP which are assessed below. An assessment in accordance with s4.15 of the Act, including those in s 4.15(1)(a)(i) which require an assessment against the provisions of any environmental planning instrument, such as the LEP, is contained within this report.

### Clause 4.3 – Height of buildings

The subject site has a maximum permitted building height of 8.5m pursuant to clause 4.3(2) in NSLEP 2013.

| Non-compliant Building Element | Control | Height | Variation |
|--------------------------------|---------|--------|-----------|
| Proposed pergola               | 8.5m    | 9.84m  | 15.7%     |



**Figure 12. Height Plane Diagram indicating the extent of the existing (yellow) and proposed (blue) variations.**

The subject site has a height limit of 8.5m pursuant to clause 4.3(2). The highest proposed external elements, being the southern end of the pergola would have an approximate height of 9.84m, which results in a variance with the height control of 1.34m (15.7%). However, while it is noted that there will be no change to the overall height of the existing building, with the pergola matching the height of the adjacent stair access to the north, the proposal requires a variation of the Development Standard in clause 4.3 in NSLEP 2013 (see discussion below).

### Clause 4.6 – Contravention of a Development Standard

It is noted that various changes to the requirements for and operation of a clause 4.6 statement came into effect on 1 November 2023 via the SEPP Amendment and Regulation Amendment. However, this change includes a savings provision that allows development applications made on or before 1 November 2023 to be determined as if the changes had not commenced. A written request to contravene the development standard for height has been submitted and has been considered below.

#### Extent of the Variation

The proposed works would exceed the maximum permitted height. The existing and proposed heights of the building have a maximum variation of 1.34m (15.7%) from the development standard.

#### Clause 4.6(3)(a) Is compliance with the development standard unreasonable and unnecessary in the circumstances of the case?

For reference the objectives of the development standard are as follows:

Clause 4.3(1) of *North Sydney Local Environmental Plan 2013*

*“(1) The objectives of this clause are as follows:*

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) to promote the retention and, if appropriate, sharing of existing views,*
- (c) to maintain solar access to existing dwellings, public reserves, and streets, and to promote solar access for future development,*
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) to ensure compatibility between development, particularly at zone boundaries,*
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*
- (g) to maintain a built form of mainly one or two storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.”*

The applicant’s written request relies upon *Webhe Test 1* to demonstrate that compliance with the development standard is unreasonable and unnecessary in this instance as the objectives of the development standard would be achieved notwithstanding the non-compliance with the development standard. The development is considered below, having regard to the objectives of the development standard.

***(1)(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,***

The proposed works would be contained within the existing building footprint above ground level and would not alter the development’s overall relationship to the topography, continuing the stepped built form of the existing building.

***(1)(b) to promote the retention and, if appropriate, sharing of existing views,***

There would be no view loss for adjoining dwellings given that majority of the works would be contained within the existing footprint, and the pergola will be adjacent to an existing staircase access on the top roof level. Given also the topography of the site, being at a lower elevation than adjoining flat buildings to the west and north, view impacts are likely to be negligible.

***(1)(c) to maintain solar access to existing dwellings, public reserves, and streets, and to promote solar access for future development,***

The levels of solar access for the properties will not substantially change as a result of the proposal. The majority of shadows cast by the new additions, will fall within existing shadows cast by the building and adjoining buildings. The proposed pergola structure will create some minor overshadowing at 9am in the morning to the eastern rear private open space of the dwellings located at 6-4 Rose Avenue to the south-west. However, this overshadowing is very minor, and these properties will be unaffected for the rest of the day.

***(1)(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,***

The placement of the pergola and associated works on the existing roof terrace are unlikely to create significant additional privacy impacts when compared to existing. The existence of dense tree foliage along the western side of the site significant screens the roof terrace from neighbours to the west. The 4.6 statement has adequately addressed this provision.

***(1)(e) to ensure compatibility between development, particularly at zone boundaries,***

The site is located within the R2 Low Density Residential zone and adjoins R4 high density zones on all sides. The proposed works will retain the existing footprint of the building, with some additions partially above the height limit, with a development that is broadly consistent with nearby residential flat building developments in the R4 zones.

***(1)(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.***

The proposed scale and density of the development is appropriate for the site and does not result in significant non-compliances with Council's controls. While the proposal involves works to a building with an existing non-compliance in building height, the overall development is compatible with the existing building and surrounding buildings, given that the existing building on site benefits from existing use rights within the R2 zone.

***(1)(g) to maintain a built form of mainly one or two storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.***

The proposal involves works to an existing 4-storey building, including the addition of a pergola to an existing roof terrace. As the number of storeys in this development does not change, the built form character of the area is unlikely to be significantly change by this development, which will remain compatible with surrounding buildings, particularly other residential flat buildings nearby within Neutral Bay.

**Clause 4.6(3)(b) Are there sufficient environmental planning grounds to justify the variation**

The applicant has provided the following grounds for the variation to the permissible height limit:

***Ground 1 – Minor nature of breach and topography***

*The extent of building height breach is confined to the eastern edge of the proposed structure with the extent of breach exacerbated by the irregular topography of the land. The building height breaching elements are quantitatively and qualitatively appropriately described as minor.*

*Consistent with the findings of Commissioner Walsh in Eather v Randwick City Council [2021] NSWLEC 1075 and Commissioner Grey in Petrovic v Randwick City Council [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.*

**Ground 2 – Objectives of the Act**

Objective (c) to promote the orderly and economic use and development of land.

*For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use by enabling minor works to improve the amenity of the existing terrace by providing all season weather protection. Strict compliance would compromise the amenity of the existing private open space. Approval of the building height variation will achieve this objective.*

Objective (g) to promote good design and amenity of the built environment

*For the reasons outlined in this submission, approval of the variation to the building height standard will promote good contextually appropriate design and facilitate enhanced design quantity and amenity outcomes for the development. Approval of the building height variation will achieve this objective.*

The above environmental planning grounds are considered to be well-grounded and are adequately justified within the submitted 4.6 variation request. Furthermore, the amenity impacts of the development are considered to be minimal and compliant with Council's controls in Part B of NSDCP 2013. The proposed alterations to the existing building will not significantly alter the existing scale of the building and have been designed to be sympathetic to the existing building. The proposal is therefore considered to be acceptable within the site circumstances.

**Clause 4.6(4)(a)(ii) Applicant's written request**

The written request provided by the applicant adequately addresses the matters required by subclause (3) as discussed above.

**Clause 4.6(4)(a)(ii) Public Interest**

The proposed development would be in the public interest because it is consistent with the objectives of the development standard for height and the objectives of the zone as discussed above. It is also considered that the proposal does not result in any significant adverse impacts for the character of the surrounding area or the amenity of adjoining properties.

**Conclusion**

The applicant has submitted a written request pursuant to Clause 4.6 in *NSLEP 2013*. The written request has adequately addressed subclause (3) and, subject to satisfying conditions, is considered to be in the public interest because it is consistent with the relevant development standard and the objectives of the zone. The proposal does not raise any planning issues of regional or state significance and therefore no issues are raised to prevent exercising the Secretary's delegations to approve this application in this regard.

**Clause 5.10 – Heritage conservation**

Council's Conservation Planner is satisfied that the proposed development would not adversely impact the heritage significance of the any nearby heritage item.

**Clause 6.12 – Residential flat buildings**

While the proposed development is zoned R4 High Density Residential and includes a residential flat building, the proposal involves relatively minor alterations and additions to an existing unit within the development, and will not change the nature of any adjoining development.

**North Sydney Development Control Plan 2013**

| <b>NORTH SYDNEY DEVELOPMENT CONTROL PLAN 2013</b>                             |                 |   |
|---|-----------------|---|
| <b>PART B - SECTION 1 - Residential Development</b>                           |                 |   |
|   | <b>Complies</b> | <b>Comments</b>   |
| <b>1.2 Function</b>   |                 |   |
| <b>Mixed residential population<br/>Maintaining residential accommodation</b> | Yes             | The proposal will not change the accommodation provision of the existing unit or any other unit within the existing building.   |
| <b>1.3 Environmental criteria</b>   |                 |   |
| <b>Topography</b>   | Yes             | The works will have no impact upon the existing building's relationship to the site topography and no excavation or fill is proposed.   |
| <b>Properties in proximity to Bushland</b>                                    | Yes             | The proposal will have no effect upon nearby bushland, and will not result in any changes or impacts upon significant trees or landscaping.   |
| <b>Views</b>  | Yes             | There would be no view loss for adjoining dwellings given that majority of the works would be contained within the existing footprint, and the pergola will be adjacent to an existing staircase access on the top roof level. Given also the topography of the site, being at a lower elevation than adjoining flat buildings to the west and north, view impacts are likely to be negligible.   |
| <b>Solar access</b>   | Yes             | The levels of solar access for the properties will not substantially change as a result of the proposal. The majority of shadows cast by the new additions, will fall within existing shadows cast by the building and adjoining buildings. The proposed pergola structure will create some minor overshadowing at 9am in the morning to the eastern rear private open space of the dwellings located at 6-4 Rose Avenue to the south-west. However, this overshadowing is very minor, and these properties will be unaffected for the rest of the day. |
| <b>Acoustic privacy<br/>Visual privacy</b>                                    | Yes             | The placement of the pergola and associated works on the existing roof terrace are unlikely to create significant additional privacy impacts when compared to existing. The existence of dense tree foliage along the western side of the site significant screens the roof terrace from neighbours to the west. The 4.6 statement has adequately addressed this provision.   |
| <b>1.4 Quality Built Form</b>   |                 |   |
| <b>Siting</b>   | Yes             | The works are consistent with the existing site of the building.  |
| <b>Setbacks</b>   | Yes             | The works are contained within the existing roof terrace within the footprint of the building and are sufficiently setback from the site boundaries.  |
| <b>Form, massing and scale</b>  | Yes             | The proposed works are consistent with the built form, massing, and scale within the area by maintaining the overall height and scale of the existing residential flat building.  |
| <b>Built form character</b>   | Yes             | The works are consistent with the existing modernist design of the building.  |
| <b>Roofs</b>  | Yes             | The flat roof of the pergola is consistent with flat roofs of the existing building and surrounding buildings, and minimises the bulk and scale of the addition.  |



|   |     |  |
|---|-----|--|
| <b>Colours and materials</b>                                | Yes | The proposed metal and glass materials for the pergola and the glazed balustrades are consistent with the late 20 <sup>th</sup> century style of the existing building and nearby buildings of the same era. |
| <b>1.5 Quality urban environment</b>                        |     |  |
| <b>High quality residential accommodation</b>               | Yes | The amenity of the unit will be enhanced by this proposal through the provision of greater living spaces and usability of the existing roof terrace.   |
| <b>Safety and security</b>                                  | Yes | Safety and security would not be compromised as a result of the subject development application.   |
| <b>Site Coverage, Unbuilt-Upon Area and Landscaped Area</b> | N/A | The proposal works are entirely contained within the existing building footprint and will not change any of these areas.   |
| <b>Vehicle Access and Car parking</b>                       | N/A | The existing unit parking provision is unchanged by this proposal.   |
| <b>Landscaping and front gardens</b>                        | N/A | The proposal will have no impact upon existing landscaping on the site.  |
| <b>Private and communal open space</b>                      | Yes | A substantial area of private open space is retained for the subject unit.   |
| <b>1.6 Efficient use of resources</b>                       |     |  |
| <b>Energy Efficiency</b>                                    | Yes | The proposal does not trigger the requirement to submit a BASIX Certificate.   |

### Neutral Bay Planning Area (Forsyth Neighbourhood)

Consideration has been given to the Character Statement for the Neutral Bay Planning Area in Part C of NSDCP 2013, including Section 7.1 (Forsyth Neighbourhood) where this site is located. The proposal is likely to comply with the characteristic development of the neighbourhood, as it will not be highly visible from the public domain or adjoining properties, with no significant adverse impact upon the amenity of nearby dwellings, subject to conditions.

### LOCAL INFRASTRUCTURE CONTRIBUTIONS PLAN

The proposal involves development where the cost of the proposed development is less than \$100,000 (\$48,000), which is classified as exempt from contribution payments, under the North Sydney Local Infrastructure Contributions Plan 2020.

### ALL LIKELY IMPACTS OF THE DEVELOPMENT

All likely impacts of the proposed development have been considered within the context of this report.

### ENVIRONMENTAL APPRAISAL

### CONSIDERED

- |    |   |     |
|----|---|-----|
| 1. | Statutory Controls  | Yes |
| 2. | Policy Controls   | Yes |
| 3. | Design in relation to existing building and natural environment | Yes |
| 4. | Landscaping/Open Space Provision                                | Yes |
| 5. | Traffic generation and Carparking provision                     | Yes |

|    |   |     |
|----|---|-----|
| 6. | Loading and Servicing facilities  | Yes |
| 7. | Physical relationship to and impact upon adjoining development (Views, privacy, overshadowing, etc.)      | Yes |
| 8. | Site Management Issues  | Yes |
| 9. | All relevant s4.15(1) considerations of <i>Environmental Planning and Assessment (Amendment) Act 1979</i> | Yes |

#### **SUITABILITY OF THE SITE (Section 4.15 of the EPAA 1979)**

The proposal involves residential development in a residential zone, so the proposal is considered to be suitable for the subject site.

#### **SUBMISSIONS (Section 4.15 of the EPA&A 1979)**

The development application was notified in accordance with Council's Community Engagement Protocol from 25 August 2023 until 8 September 2023. No submissions were received.

#### **PUBLIC INTEREST (Section 4.15 of the EPAA 1979)**

The proposal would provide improved amenity for the residents without causing any unreasonable impacts to the area character, the streetscape, and/or adjoining properties so the proposal would not be contrary to the public interest.

#### **HOW THE COMMUNITY VIEWS WERE TAKEN INTO CONSIDERATION**

The development application was notified in accordance with Council's Community Engagement Protocol and no submissions were received. Nevertheless, it is considered that, subject to conditions, the proposal would provide improved amenity for the residents without causing any unreasonable impacts to the streetscape and/or adjoining properties.

#### **CONCLUSION AND REASONS**

The matters for consideration as outlined in section 4.15(1) of the Act have been satisfied. The proposed development is permissible, meets the development standards and relevant provisions of *NSLEP 2013* subject to the written request to vary the height of buildings development standard made pursuant to clause 4.6 of *NSLEP 2013*. The proposed development is also generally in accordance with the objectives in *NSDCP 2013*.

The proposed additions are mostly compliant with Council's controls in *NSDCP 2013*, with relatively minor alterations and additions to an existing roof terrace that will not be highly visible from the public domain. The clause 4.6 submitted demonstrates that in the particular circumstances of the case that strict compliance is unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify the variation.

There would be no unreasonable overshadowing, view loss, privacy loss and/or excessive bulk and scale as a result of the proposal given that the majority of the works will be contained within the overall footprint of the existing building and will be sympathetic to the existing residential flat building, and the adjoining buildings.

On balance, the application is considered reasonable and is recommended for **approval** subject to site specific and standard conditions.

### **RECOMMENDATION**

PURSUANT TO SECTION 4.16 OF *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979* (AS AMENDED)

**THAT** the North Sydney Local Planning Panel, exercising the functions of Council, assume the concurrence of the Secretary of The Department of Planning and Environment and invoke the provisions of Clause 4.6 in NSLEP 2013 with regards to the non-compliance with Clause 4.3 and **grant consent** to Development Application No. 242/23 for alterations and additions to an existing Unit 9, on land at 17 Wyagdon Street, Neutral Bay, subject to attached site specific and standard conditions.

**ANDREW BEVERIDGE**  
**SENIOR ASSESSMENT OFFICER**

**ISOBELLA LUCIC**  
**TEAM LEADER ASSESSMENTS**

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**STEPHEN BEATTIE**  
**MANAGER DEVELOPMENT SERVICES**

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**NORTH SYDNEY COUNCIL**  
**CONDITIONS OF DEVELOPMENT APPROVAL**  
**UNIT 9, 17 WYAGDON STREET, NEUTRAL BAY**  
**DEVELOPMENT APPLICATION NO. 242/23**

**A. Conditions that Identify Approved Plans**

**Development in Accordance with Plans/Documentation**

- A1. The development must be carried out in accordance with the following drawings endorsed with Council's approval stamp and other documentation listed in the table to this clause, or cited by other conditions, and as amended by other conditions of this consent.

| Plan No. | Revision | Description               | Prepared by       | Dated      | Received   |
|----------|----------|---------------------------|-------------------|------------|------------|
| DA01     | A        | Site Plan                 | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA02     | A        | Proposed Floor Plan       | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA03     | A        | Proposed Roof Plan        | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA04     | A        | Proposed Elevations       | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA05     | A        | Proposed Sections 01 & 02 | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA06     | A        | Proposed West Elevation   | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA07     | A        | Proposed South Elevation  | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA08     | A        | Proposed East Elevation   | COSO Architecture | 21/11/2023 | 23/11/2023 |
| DA12     | A        | Materials and Finishes    | COSO Architecture | 21/11/2023 | 23/11/2023 |

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information)

**Plans on Site**

- A2. A copy of all plans endorsed with Council's approval stamp, specifications, and documents (including the plans, specifications and documents submitted and approved with the Construction Certificate) must be kept on site at all times so as to be readily available for perusal by any officer of Council or the Principal Certifier.

All documents kept on site in accordance with this condition must be provided to any officer of the Council or the Principal Certifier upon their request.

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information and to ensure ongoing compliance)

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DEVELOPMENT APPLICATION NO. 242/23**Page 2 of 17

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**No Demolition of Extra Fabric**

- A3. Alterations to, and demolition of the existing building shall be limited to that documented on the approved plans.

(Reason: To ensure compliance with the approved development)

**External Finishes and Materials**

- A4. External finishes and materials must be in accordance with the submitted schedule No. DA12, Revision A), dated 21 November 2023, prepared by COSO Architecture, and received by Council on 23 November 2023 unless otherwise modified by Council in writing. Substitution of materials must not be undertaken, except where otherwise approved in writing by Council.

(Reason: To ensure that the form of the development undertaken is in accordance with the determination of Council, Public Information)

**C. *Prior to the Issue of a Construction Certificate (and ongoing, where indicated)*****Dilapidation Report Damage to Public Infrastructure**

- C1. A dilapidation survey and report (including photographic record) must be prepared by a suitably qualified consultant which details the pre-developed condition of the existing public infrastructure in the vicinity of the development site. Particular attention must be paid to accurately recording any pre-developed damaged areas so that Council is fully informed when assessing any damage to public infrastructure caused as a result of the development. A copy of the dilapidation survey and report is to be submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate.

The developer may be held liable for all damage to public infrastructure in the vicinity of the site, where such damage is not accurately recorded and demonstrated as pre-existing under the requirements of this condition.

The developer shall bear the cost of carrying out works to restore all public infrastructure damaged as a result of the carrying out of the development, and no occupation of the development shall occur until damage caused as a result of the carrying out of the development is rectified.

A copy of the dilapidation survey and report must be lodged with North Sydney Council by the Principal Certifier with submission of the Construction Certificate documentation.

(Reason: To record the condition of public infrastructure prior to the commencement of construction)

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**Dilapidation Survey Private Property (Neighbouring Buildings)**

- C2. A photographic survey and dilapidation report of all directly adjoining units and common property of 17 Wyagdon Street, Neutral Bay detailing the physical condition of those properties, both internally and externally, including, but not limited to, such items as walls, ceilings, roof, structural members and other similar items, MUST BE submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate. The survey and report are to be prepared by an appropriately qualified person and a copy to be given to the owner of the adjoining property. A copy of the report is to be provided to Council, if Council is not the Principal Certifier, prior to the issue of any Construction Certificate.

All costs incurred in achieving compliance with this condition shall be borne by the person entitled to act on this Consent.

In the event that access for undertaking the photographic survey and dilapidation report is denied by an adjoining owner, the applicant MUST DEMONSTRATE, in writing, to the satisfaction of Council that all reasonable steps have been taken to obtain access and advise the affected property owner of the reason for the survey and that these steps have failed. Written concurrence must be obtained from Council in such circumstances.

Note: This documentation is for record keeping purposes only and may be used by an applicant or affected property owner to assist in any action required to resolve any dispute over damage to adjoining properties arising from the works. It is in the applicant's and adjoining owner's interest for it to be as full and detailed as possible.

(Reason: Proper management of records)

**Structural Adequacy of Existing Building**

- C3. A report prepared by an appropriately qualified and practising structural engineer, certifying the structural adequacy of the property and its ability to withstand the proposed additional, or altered structural loads during all stages of construction shall be submitted to the Principal Certifier for approval prior to issue of any Construction Certificate. The certified report must also include all details of the methodology to be employed in construction phases to achieve the above requirements. The methodology in the certified report must be complied with at all times.

(Reason: To ensure the structural integrity of the building is maintained)

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**Sediment Control**

- C4. Where construction or excavation activity requires the disturbance of the soil surface or existing vegetation, erosion, and sediment control techniques, as a minimum, are to be in accordance with the publication *Managing Urban Stormwater: Soils and Construction* (4th Edition, Landcom, 2004) commonly referred to as the "Blue Book" or a suitable and effective alternative method.

An Erosion and Sediment Control Plan must be prepared and submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate and prior to any works commencing. The Erosion and Sediment Control Plan must be consistent with the Blue Book and disclose:

- a) All details of drainage to protect and drain the site during the construction processes;
- b) All sediment control devices, barriers, and the like;
- c) Sedimentation tanks, ponds, or the like;
- d) Covering materials and methods; and
- e) A schedule and programme of the sequence of the sediment and erosion control works or devices to be installed and maintained.
- f) Methods for the temporary and controlled disposal of stormwater during construction.

All works must be undertaken in accordance with the approved Sediment Control plan.

The Principal Certifier must ensure that the building plans and specifications submitted, referenced on, and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To protect the environment from the effects of sedimentation and erosion from development sites)

**Waste Management Plan**

- C5. A Waste Management Plan is to be submitted for approval by the Principal Certifier prior to the issue of any Construction Certificate. The plan must include, but not be limited to:
- a) The estimated volume of waste and method of disposal for the construction and operation phases of the development;
  - b) The design of the on-site waste storage and recycling area; and
  - c) Administrative arrangements for waste and recycling management during the construction process.

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The approved Waste Management Plan must be complied with at all times in the carrying out of the development.

(Reason: To encourage the minimisation of waste and recycling of building waste)

**External Colours and Finishes**

- C6. The external colours and finishes shall match those as existing and/ or be compatible with surrounding development. A schedule of external colours and finishes must be submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate. The Principal Certifier must ensure that the building plans and specifications submitted, referenced on, and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure that the completed colours and finishes of the works are compatible with surrounding development)

**Roofing Materials - Reflectivity**

- C7. Roofing materials must be factory pre-finished with low glare and reflectivity properties to be compatible with the colours of neighbouring buildings. The selected roofing material must not cause a glare nuisance or excessive reflectivity to adjoining or nearby properties. Plans and specifications which comply with this condition must be submitted to the Principal Certifier for approval prior to the issue of any Construction Certificate. The Principal Certifier must ensure that the building plans and specifications submitted, referenced on, and accompanying the issued Construction Certificate, fully satisfy the requirements of this condition.

(Reason: To ensure that excessive glare or reflectivity nuisance from roofing materials does not occur as a result of the development)

**Work Zone**

- C8. If a Work Zone is required a Work Zone permit is to be obtained from Council prior to the issue of any Construction Certificate.

**Note:** For major development, an application for work zone permit must be considered by the North Sydney Local Traffic Committee.

Work Zones are provided specifically for the set down and pick up of materials and not for the parking of private vehicles associated with the site. Works Zones will generally not be approved where there is sufficient space on-site for the setting down and picking up of goods being taken to or from a construction site. If the Works Zone is approved by the Committee, the Applicant must obtain a written copy of the related resolution from the North Sydney Local Traffic Committee and submit a copy of this to the Principal Certifier to enable issue of the Construction Certificate.



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Where approval of the 'Work Zone' is given by the Committee, the requirements of the Committee, including installation of the necessary 'Work Zone' signage and payment of any fees, must occur prior to commencement of any works on the site. Further, at the expiration of the Work Zone approval, the developer is required to remove the Work Zone signs and reinstate any previous signs, all at the developer's cost. The requirements imposed by the Committee on the Work Zone permit (or permits) must be complied with at all times.

(Reason: Amenity and convenience during construction)

**Bond for Damage and Completion of Infrastructure Works – Stormwater, Kerb and Gutter, Footpaths, Vehicular Crossing and Road Pavement**

- C9. Prior to the issue of any Construction Certificate, security deposit or bank guarantee must be provided to Council to the sum of \$2,500.00 to be held by Council for the payment of cost for any/all of the following:
- a) making good any damage caused to any property of the Council as a consequence of the doing of anything to which this consent relates,
  - b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and [environmental controls](#)) required in connection with this consent
  - c) remedying any defects in any such public work that arise within 6 months after the work is completed.
  - d) Council reserves the right to retain all bonds on infrastructure works relating to the completion of required Infrastructure work for a 12-month defect liability period. Council may elect to provide a lesser period for minor residential work.

The security required by this condition and in the schedule contained later in these conditions must be provided by way of a deposit with the Council; or other such guarantee that is satisfactory to Council (such as a bank guarantee). Any guarantee provided as security must name North Sydney Council as the nominated beneficiary and must not be subject to an expiry date.

The security will be refundable following the expiration of six months from the issue of any final Occupation Certificate or completion of public work required to be completed (whichever is the latest) but only upon inspection and release by Council's Development Engineers or Manager of Development Services.

Council shall have full authority to make use of the bond for such restoration works as deemed necessary by Council in circumstances including the following:

- where the damage constitutes a hazard in which case Council may make use of the security immediately;
- the applicant has not repaired or commenced repairing damage within 48 hours of the issue by Council in writing of instructions to undertake such repairs or works;

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- works in the public road associated with the development are to an unacceptable quality; and
- the Principal Certifier must ensure that security is provided to North Sydney Council prior to issue of any Construction Certificate.

(Reason: To ensure appropriate security for works on public land and an appropriate quality for new public infrastructure)

**Security Deposit/Guarantee Schedule**

- C10. All fees and security deposits/ guarantees in accordance with the schedule below must be provided to Council prior to the issue of any Construction Certificate:

| <b>Security Deposit/Guarantee</b> | <b>Amount (\$)</b> |
|-----------------------------------|--------------------|
| Infrastructure Damage Bond        | \$2,500.00         |
| <b>TOTAL BONDS</b>                | <b>\$2,500.00</b>  |

The security required by the above schedule must be provided by way of a deposit with the Council; or other such guarantee that is satisfactory to Council (such as a bank guarantee). Any guarantee provided as security must name North Sydney Council as the nominated beneficiary and must not be subject to an expiry date.

(Reason: Compliance with the development consent)

**D. *Prior to the Commencement of any Works (and continuing where indicated)***

**Public Liability Insurance – Works on Public Land**

- D1. Any person or contractor undertaking works on public land must take out Public Risk Insurance with a minimum cover of \$20 million in relation to the occupation of public land and the undertaking of approved works within Council's road reserve or public land, as approved by this consent. The Policy is to note and provide protection/full indemnification for North Sydney Council, as an interested party. A copy of the Policy must be submitted to Council prior to commencement of any works. The Policy must be valid for the entire period that the works are being undertaken.

(Note: Applications for hoarding permits, vehicular crossings etc will require evidence of insurance upon lodgement of the application.)

(Reason: To ensure the community is protected from the cost of any claim for damages arising from works on public land)

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**Commencement of Works' Notice**

- D2. Building work, demolition, or excavation in accordance with this development consent must not be commenced until the developer has given at least 2 days notice to North Sydney Council of the person's intention to commence building work, demolition, or excavation in accordance with this development consent.

(Reason: To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition, or excavation)

**E. During Demolition and Building Work****Parking Restrictions**

- E1. Existing public parking provisions in the vicinity of the site must be maintained at all times during works. The placement of any barriers, traffic cones, obstructions or other device in the road shoulder or kerbside lane is prohibited without the prior written consent of Council. Changes to existing public parking facilities/restrictions must be approved by the North Sydney Local Traffic Committee. The Developer will be held responsible for any breaches of this condition and will incur any fines associated with enforcement by Council regulatory officers.

(Reason: To ensure that existing kerbside parking provisions are not compromised during works)

**Road Reserve Safety**

- E2. All public footways and roadways fronting and adjacent to the site must be maintained in a safe condition at all times during the course of the development works, with no obstructions caused to the said footways and roadways. Construction materials and plant must not be stored in the road reserve without approval of Council. A safe pedestrian circulation route and a pavement/route free of trip hazards must be maintained at all times on or adjacent to any public access ways fronting the construction site.

Where public infrastructure is damaged, repair works must be carried out in when and as directed by Council officers (at full Developer cost). Where pedestrian circulation is diverted on to the roadway or verge areas, clear directional signage and protective barricades must be installed in accordance with AS1742-3 (1996) "Traffic Control Devices for Work on Roads". **If pedestrian circulation is not satisfactorily maintained across the site frontage, and action is not taken promptly to rectify the defects, Council may undertake proceedings to stop work.**

(Reason: Public Safety)

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**Temporary Disposal of Stormwater Runoff**

- E3. During construction, stormwater runoff must be disposed in a controlled manner that is compatible with the erosion and sediment controls on the site. Immediately upon completion of any impervious areas on the site (including roofs, driveways, paving) and where the final drainage system is incomplete, the necessary temporary drainage systems must be installed to reasonably manage and control runoff as far as the approved point of stormwater discharge. Such ongoing measures must be to the satisfaction of the Principal Certifier.

(Reason: Stormwater control during construction)

**Removal of Extra Fabric**

- E4. Should any portion of the existing building, trees, or curtilage of the site which is indicated on the approved plans to be retained be damaged for whatever reason, all the works in the area of the damaged portion are to cease and written notification of the damage is to be given to Council forthwith. No work is to resume until the written approval of Council to do so is obtained. Failure to comply with the provisions of this condition may result in the Council taking further action including legal proceedings if necessary.

(Reason: To ensure compliance with the terms of this development consent)

**Dust Emission and Air Quality**

- E5. The following must be complied with at all times:

- (a) Materials must not be burnt on the site.
- (b) Vehicles entering and leaving the site with soil or fill material must be covered.
- (c) Dust suppression measures must be carried out to minimise wind-borne emissions in accordance with the NSW Department of Housing's 1998 guidelines - Managing Urban Stormwater: Soils and Construction.
- (d) Odour suppression measures must also be carried out where appropriate so as to prevent nuisance occurring at adjoining properties.

(Reason: To ensure residential amenity is maintained in the immediate vicinity)

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**Noise and Vibration**

- E6. The works must be undertaken in accordance with the "Interim Construction Noise Guideline" published by the NSW Environment Protection Authority, to ensure excessive levels of noise and vibration do not occur so as to minimise adverse effects experienced on any adjoining land.

(Reason: To ensure residential amenity is maintained in the immediate vicinity)

**No Work on Public Open Space**

- E7. No work can be undertaken within adjoining public lands (i.e., Parks, Reserves, Roads etc) without the prior written consent of Council. In this regard the developer is to liaise with Council prior to the commencement of any design works or preparation of a Construction and Traffic Management Plan.

(Reason: Protection of existing public infrastructure and land and to ensure public safety and proper management of public land)

**Developer's Cost of Work on Council Property**

- E8. The Developer or the person, company or other entity that is acting upon this consent, must bear the cost of all works associated with the development that occurs on Council's property, including the restoration of damaged areas.

(Reason: To ensure the proper management of public land and funds)

**No Removal of Trees on Public Property**

- E9. No trees on public property (footpaths, roads, reserves, etc.) unless specifically approved by this consent shall be removed or damaged during construction including for the erection of any fences, hoardings, or other temporary works.

(Reason: Protection of existing environmental infrastructure and community assets)

**Special Permits**

- E10. Unless otherwise specifically approved in writing by Council, all works, processes, storage of materials, loading and unloading associated with the development must occur entirely on the property.

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The developer, owner or builder may apply for specific permits available from Council's Customer Service Centre for the undermentioned activities on Council's property. In the event that a permit is granted by Council for the carrying out of works, processes, storage of materials, loading and unloading associated with the development on Council's property, the development must be carried out in accordance with the requirements of the permit. A minimum of forty-eight (48) hours' notice is required for any permit:

**1) On-street mobile plant**

Eg. cranes, concrete pumps, cherry-pickers, etc., - restrictions apply to the hours of operation, the area of operation, etc. Separate permits are required for each occasion and each piece of equipment. It is the developer's, owner's, and builder's responsibilities to take whatever steps are necessary to ensure that the use of any equipment does not violate adjoining property owner's rights.

(Reason: Proper management of public land)

**2) Hoardings**

Permits are required to erect Class A and Class B hoardings. If an 'A' Class hoarding is to alienate a section of Council's property, that section will require a permit for the occupation of Council's property.

(Reason: Proper management of public land)

**3) Storage of building materials and building waste containers (skips) on Council's property**

Permits to utilise Council property for the storage of building materials and building waste containers (skips) are required for each location. Failure to obtain the relevant permits will result in the building materials or building waste containers (skips) being impounded by Council with no additional notice being given. Storage of building materials and waste containers on open space reserves and parks is prohibited.

(Reason: Proper management of public land)

**4) Kerbside restrictions, construction zones**

Attention is drawn to the existing kerbside restrictions adjacent to the development. Should alteration of existing kerbside restrictions be required, or the provision of a construction zone, the appropriate application must be made, and the fee paid to Council. Alternatives to such restrictions may require referral to Council's Traffic Committee and may take considerable time to be resolved. An earlier application is suggested to avoid delays in construction programs.

(Reason: Proper management of public land)

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**Construction Hours**

- E11. Construction activities and works approved under this consent must be restricted to within the hours stipulated in the following table:

| Standard Construction Hours |                          |                   |
|-----------------------------|--------------------------|-------------------|
| Location                    | Day                      | Hours             |
| All zones                   | Monday - Friday          | 7.00am - 5.00pm   |
|                             | Saturday                 | 8.00am - 1.00pm   |
|                             | Sunday<br>Public holiday | No work permitted |

Construction activities for development approved under this consent must be carried out in accordance with the standard construction hours above, the EPA Noise Policy for Industry 2017 and any Construction Noise Management Plan required under this consent.

In the event of breach to the approved hours of construction Council take may take enforcement action under Part 9 of the EP & A Act 1979 and in accordance with Council's adopted Compliance & Enforcement Policy.

(Reason: To ensure that works do not interfere with reasonable amenity expectations of residents and the community)

**Site Amenities and Facilities**

- E12. Where work involved in the erection and demolition of a building is being carried out, amenities which satisfy applicable occupational health and safety and construction safety regulations, including any WorkCover Authority requirements, must be provided, and maintained at all times. The type of workplace determines the type of amenities required.

Further information and details can be obtained from the Internet at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au).

(Reason: To ensure the health and safety of the community and workers on the site)

**Health and Safety**

- E13. All work undertaken must satisfy applicable occupational health and safety and construction safety regulations, including any WorkCover Authority requirements to prepare a health and safety plan. Site fencing must be installed sufficient to exclude the public from the site. Safety signs must be erected that warn the public to keep out of the site and provide a contact telephone number for enquiries.

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Further information and details regarding occupational health and safety requirements for construction sites can be obtained from the internet at [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au).

(Reason: To ensure the health and safety of the community and workers on the site)

**Prohibition on Use of Pavements**

- E14. Building materials must not be placed on Council's footpaths, roadways, parks, or grass verges, (unless a permit is obtained from Council beforehand). A suitable sign to this effect must be erected adjacent to the street alignment.

(Reason: To ensure public safety and amenity on public land)

**Plant and Equipment Kept Within Site**

- E15. All plant and equipment used in the undertaking of the development/ works, including concrete pumps, wagons, lifts, mobile cranes, hoardings etc, must be situated within the boundaries of the site (unless a permit is obtained from Council beforehand) and so placed that all concrete slurry, water, debris and the like must be discharged onto the building site, and is to be contained within the site boundaries.

Details of Council requirements for permits on public land for standing plant, hoardings, storage of materials and construction zones and the like are available on Council's website at [www.northsydney.nsw.gov.au](http://www.northsydney.nsw.gov.au).

(Reason: To ensure public safety and amenity on public land)

**Waste Disposal**

- E16. All records demonstrating the lawful disposal of waste must be retained and kept readily accessible for inspection by regulatory authorities such as North Sydney Council and the Environmental Protection Authority.

(Reason: To ensure the lawful disposal of construction and demolition waste)

**F. *Prescribed Conditions imposed under EP&A Act and Regulations and other relevant Legislation*****National Construction Code**

- F1. All building work must be carried out in accordance with the provisions of the National Construction Code.

(Reason: Prescribed - Statutory)



**UNIT 9, 17 WYAGDON STREET, NEUTRAL BAY  
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**Home Building Act**

- F2. 1) Building work that involves residential building work (within the meaning and exemptions provided in the Home Building Act 1989) for which the *Home Building Act 1989* requires there to be a contract of insurance under Part 6 of that Act must not be carried out unless the Principal Certifier for the development to which the work relates has given North Sydney Council written notice of the contract of insurance being issued and of the following:
- a) in the case of work for which a principal contractor is required to be appointed:
    - i) the name and licence number of the principal contractor, and
    - ii) the name of the insurer by which the work is insured under Part 6 of that Act, or
  - (b) in the case of work to be done by an owner-builder:
    - (i) the name of the owner-builder, and
    - (ii) if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.
- 2) If arrangements for doing residential building work are changed while the work is in progress such that the information submitted to Council in accordance with this condition is out of date, work must cease, and no further work may be carried out unless the Principal Certifier for the development to which the work relates (not being the Council), has given the Council written notice of the updated information.

Note: A certificate purporting to be issued by an approved insurer under Part 6 of the Home Building Act 1989 that states that a person is the holder of an insurance policy issued for the purposes of that Part is, for the purposes of this clause, sufficient evidence that the person has complied with the requirements of that Part.

(Reason: Prescribed - Statutory)

**Appointment of Principal Certifying Authority (PCA)**

- F3. Building work, **demolition**, or excavation in accordance with the development consent must not be commenced until the developer has appointed a Principal Certifier for the building work in accordance with the provisions of the EP&A Act and its Regulations.

(Reason: Statutory; To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition, or excavation)

**UNIT 9, 17 WYAGDON STREET, NEUTRAL BAY  
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**Construction Certificate**

- F4. Building work, demolition, or excavation in accordance with the development consent must not be commenced until a Construction Certificate for the relevant part of the building work has been issued in accordance with the provisions of the EP&A Act and its Regulations.

(Reason: Statutory; To ensure appropriate safeguarding measures are in place prior to the commencement of any building work, demolition, or excavation)

**Occupation Certificate**

- F5. A person must not commence occupation or use of the whole or any part of a new building (new building includes an altered portion of, or an extension to, an existing building) unless an Occupation Certificate has been issued in relation to the building or part. Only the Principal Certifier appointed for the building work can issue an Occupation Certificate.

(Reason: Statutory)

**Demolition**

- F6. Demolition work must be undertaken in accordance with the provisions of AS2601-Demolition of Structures.

(Reason: To ensure that work is undertaken in a professional and responsible manner and protect adjoining property and persons from potential damage)

**Protection of Public Places**

- F7. 1) A hoarding and site fencing must be erected between the work site and adjoining public place.
- 2) If necessary, an awning is to be erected, sufficient to prevent any substance from, or in connection with, the work falling into the public place.
- 3) The work site must be kept lit between sunset and sunrise if it is likely to be hazardous to persons in the public place.
- 4) Any such hoarding, fence or awning is to be removed when the work has been completed.
- 5) No access across public reserves or parks is permitted.

**UNIT 9, 17 WYAGDON STREET, NEUTRAL BAY  
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Note: Prior to the erection of any temporary fence or hoarding over property owned or managed by Council, written approval must be obtained. Any application needs to be accompanied by plans indicating the type of hoarding and its layout. Fees are assessed and will form part of any approval given. These fees must be paid prior to the approval being given. Approval for hoardings will generally only be given in association with approved building works, maintenance or to ensure protection of the public. An application form for a Hoarding Permit can be downloaded from Council's website.

(Reason: To ensure public safety and the proper management of public land)

**Site Sign**

- F8. 1) A sign must be erected in a prominent position on the site
- a) stating that unauthorised entry to the work site is prohibited;
  - b) showing the name of the principal contractor (or person in charge of the work site), and a telephone number at which that person may be contacted at any time for business purposes and outside working hours; and
  - c) showing the name, address, and telephone number of the Principal Certifier for the work.
- 2) Any such sign must be maintained while building work or demolition work is being carried out but must be removed when the work has been completed.

(Reason: Prescribed - Statutory)

**G. Prior to the Issue of an Occupation Certificate**

**Infrastructure Repair and Completion of Works**

- G1. Prior to the issue of any Occupation Certificate any and all works relating to the development:
- a. in the road reserve must be fully completed; and
  - b. to repair and make good any damaged public infrastructure caused as a result of any works relating to the development (including damage caused by, but not limited to, delivery vehicles, waste collection, contractors, sub-contractors, concrete vehicles) must be fully repaired;

to the satisfaction of Council Engineers at no cost to Council. Council's development engineer must be contacted to arrange inspections of the completed works in the Public Domain.

(Reason: Maintain quality of Public assets)

**UNIT 9, 17 WYAGDON STREET, NEUTRAL BAY  
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**Damage to Adjoining Properties**

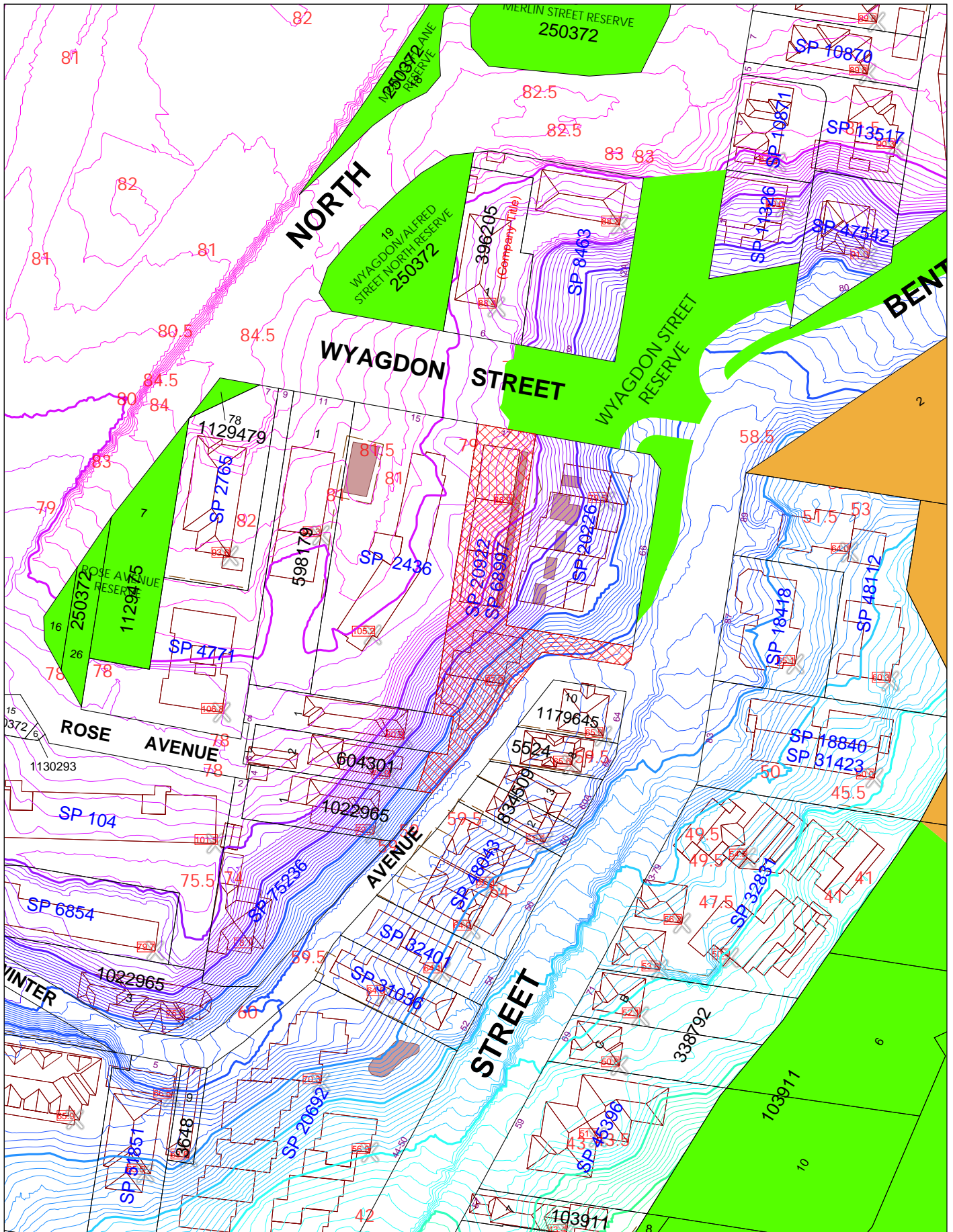
- G2. All precautions must be taken to prevent any damage likely to be sustained to adjoining properties. Adjoining owner property rights and the need for owner's permission must be observed at all times, including the entering onto land for the purpose of undertaking works.

(Reason: To ensure adjoining owner's property rights are protected)

**Utility Services**

- G3. All utility services shall be adjusted to the correct levels and/or location/s required by this consent, prior to issue of an occupation certificate. This shall be at no cost to Council.

(Reason: To ensure compliance with the terms of this consent)

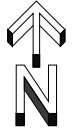


**North Sydney Council**

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Further details can be obtained by calling (02) 9936 8100 or e-mail mapping@northsydney.nsw.gov.au.

Scale: 1:1200 approx.



# DEVELOPMENT APPLICATION

9/17 WYAGDON STREET, NEUTRAL BAY

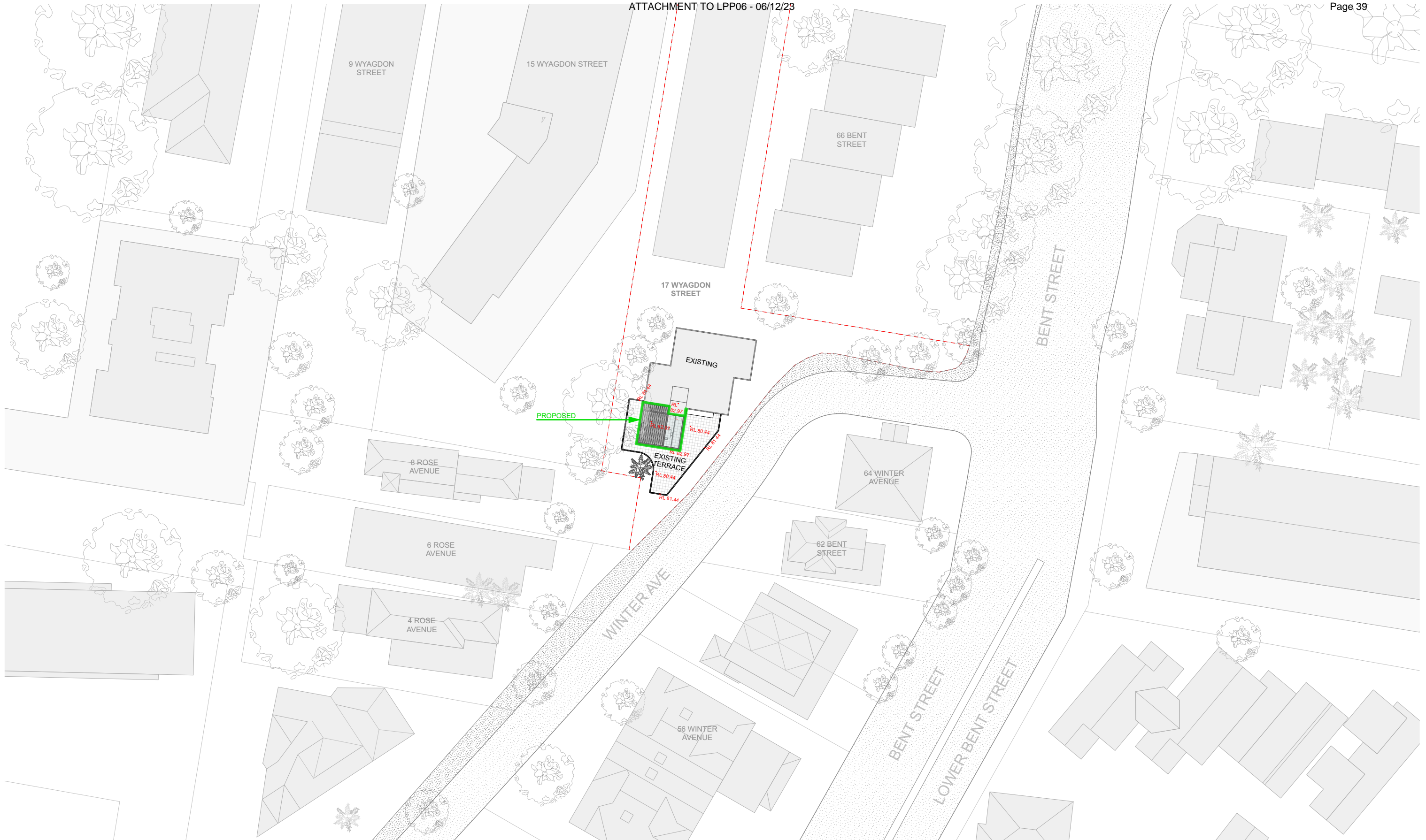
## PROPOSED

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|-------|---|----------------------------|--------|
| DA_01 | A | PROPOSED SITE PLAN         | 1:200  |
| DA_02 | A | PROPOSED FLOOR PLAN        | 1:100  |
| DA_03 | A | PROPOSED ROOF PLAN         | 1:100  |
| DA_04 | A | PROPOSED ELEVATIONS        | 1:50   |
| DA_05 | A | PROPOSED SECTIONS          | 1:50   |
| DA_06 | A | PROPOSED EAST ELEVATION    | 1:100  |
| DA_07 | A | PROPOSED WEST ELEVATION    | 1:100  |
| DA_08 | A | PROPOSED SOUTH ELEVATION   | 1:100  |
| DA_09 | A | SHADOWS 9AM                | 1:500  |
| DA_10 | A | SHADOWS 12 NOON            | 1:500  |
| DA_11 | A | SHADOWS 3PM                | 1:500  |
| DA_12 | A | MATERIALS AND FINISHES     | 1:50   |
| DA_13 | A | STORMWATER MANAGEMENT PLAN | 1:100  |
| DA_14 | A | WASTE MANAGEMENT PLAN      | 1:200  |
| DA_15 | A | HEIGHT BLANKET             | N.T.S. |
| DA_16 | A | HEIGHT LIMIT DIAGRAM       | 1:100  |



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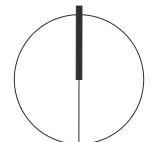
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**SITE PLAN**

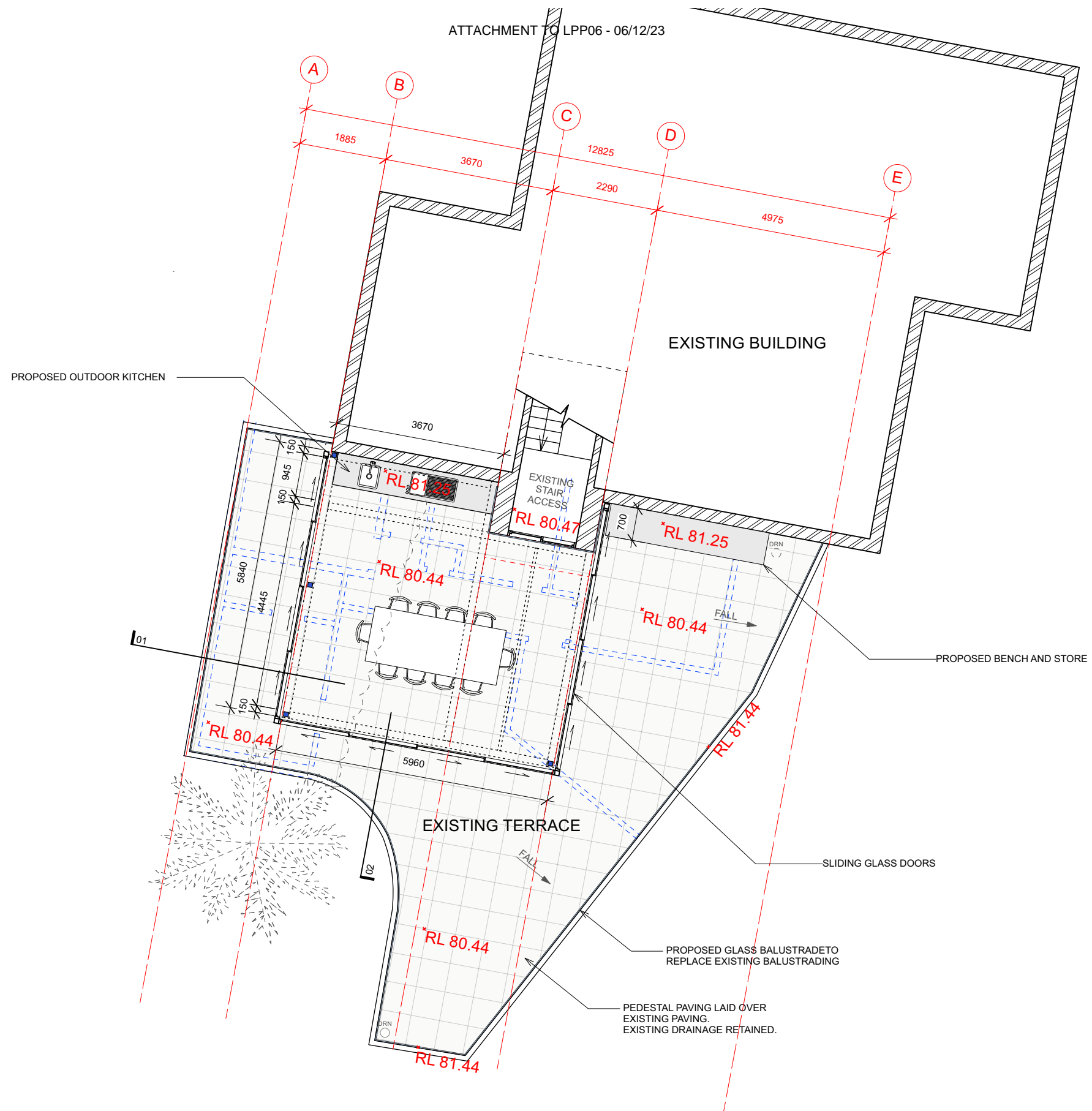
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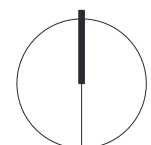
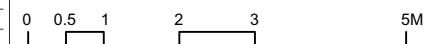
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**PROPOSED FLOOR PLAN**

DATE: 21 NOVEMBER 2023  
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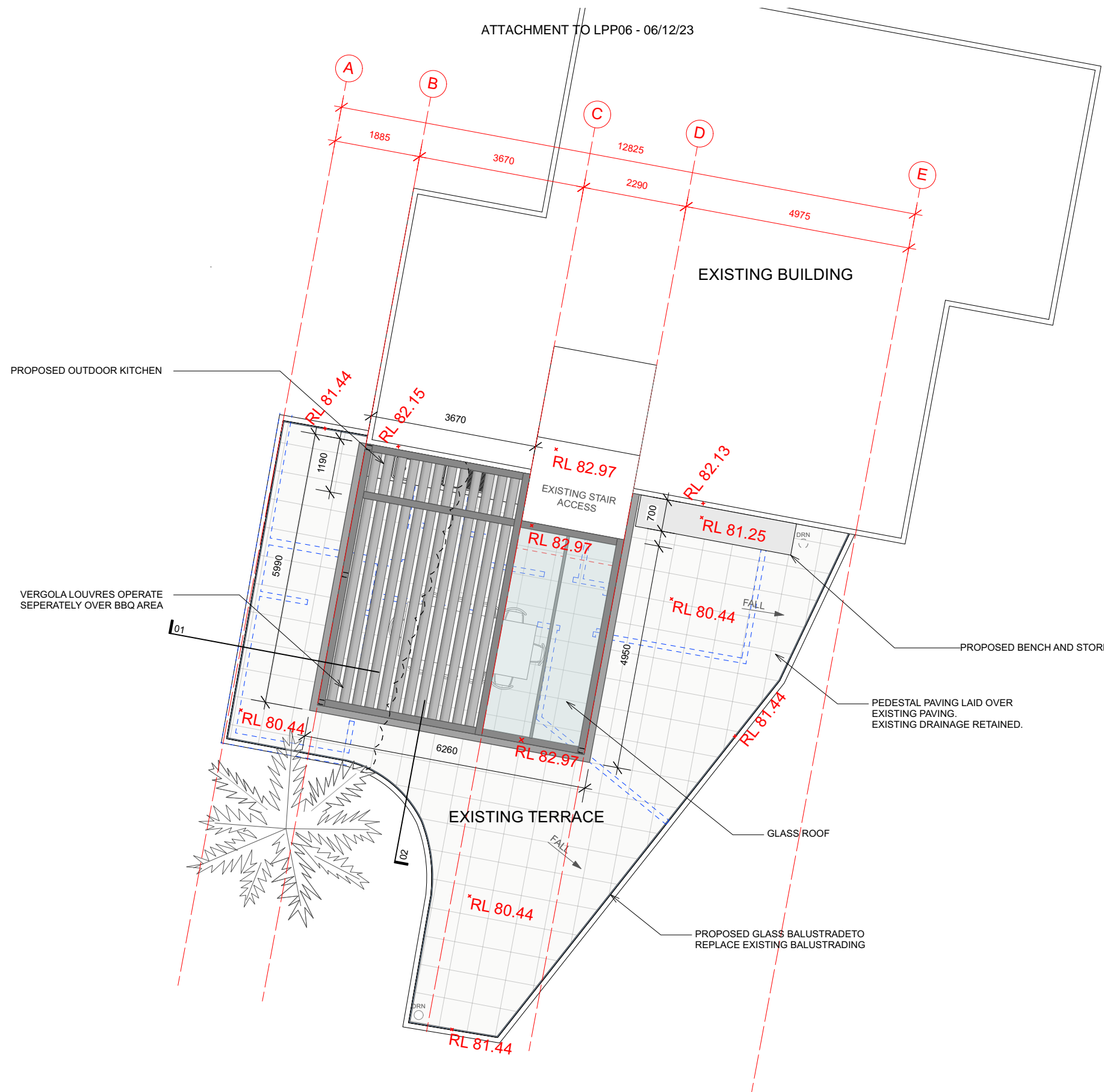
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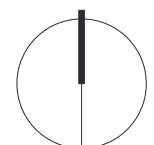
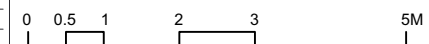
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**PROPOSED ROOF PLAN**

DATE: 21 NOVEMBER 2023  
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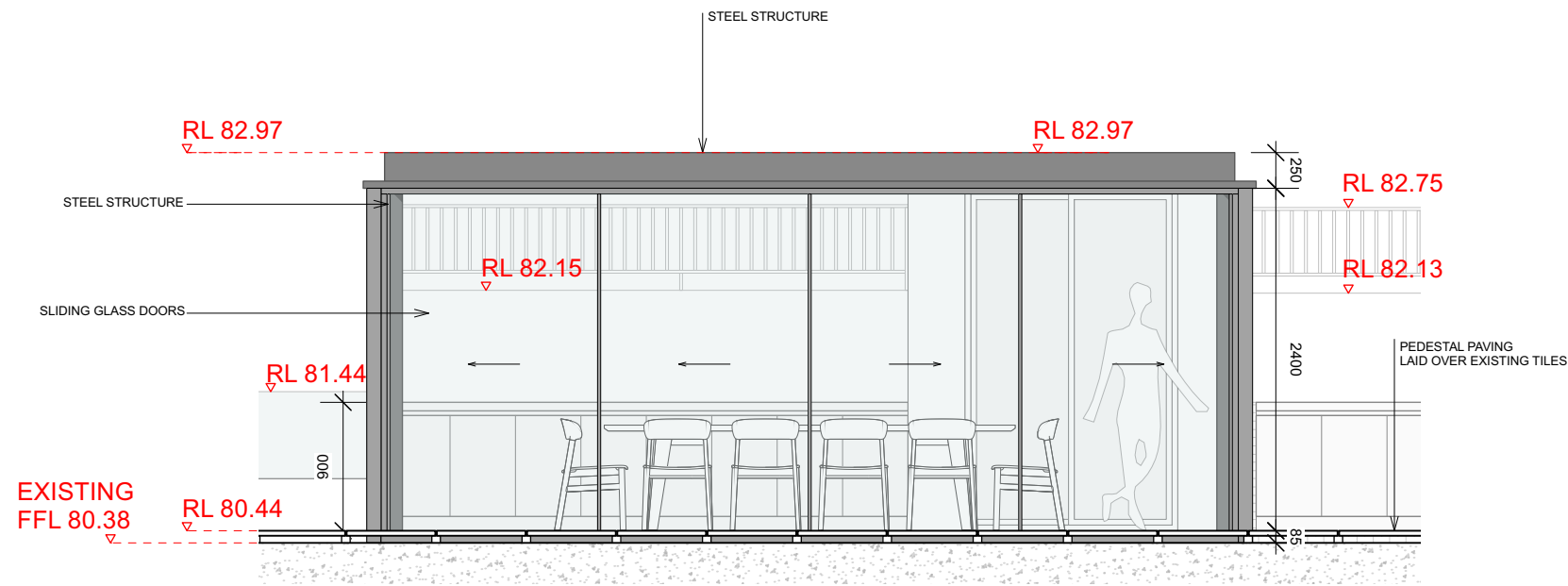


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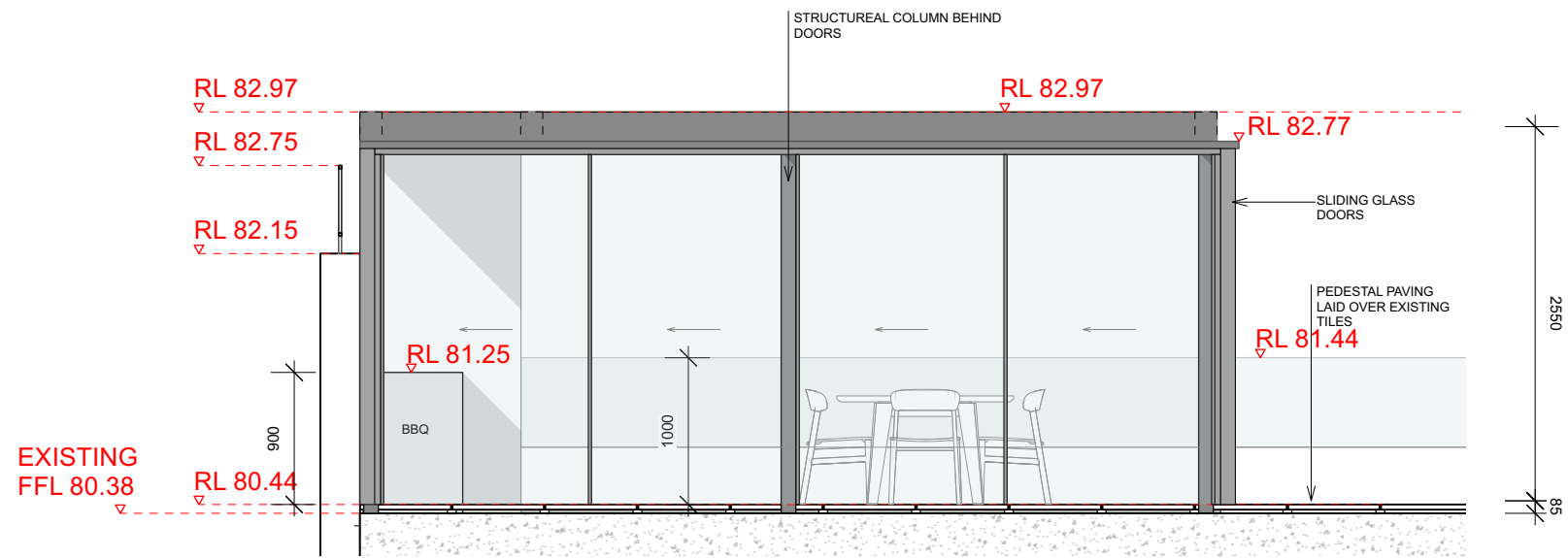
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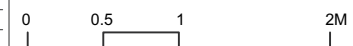


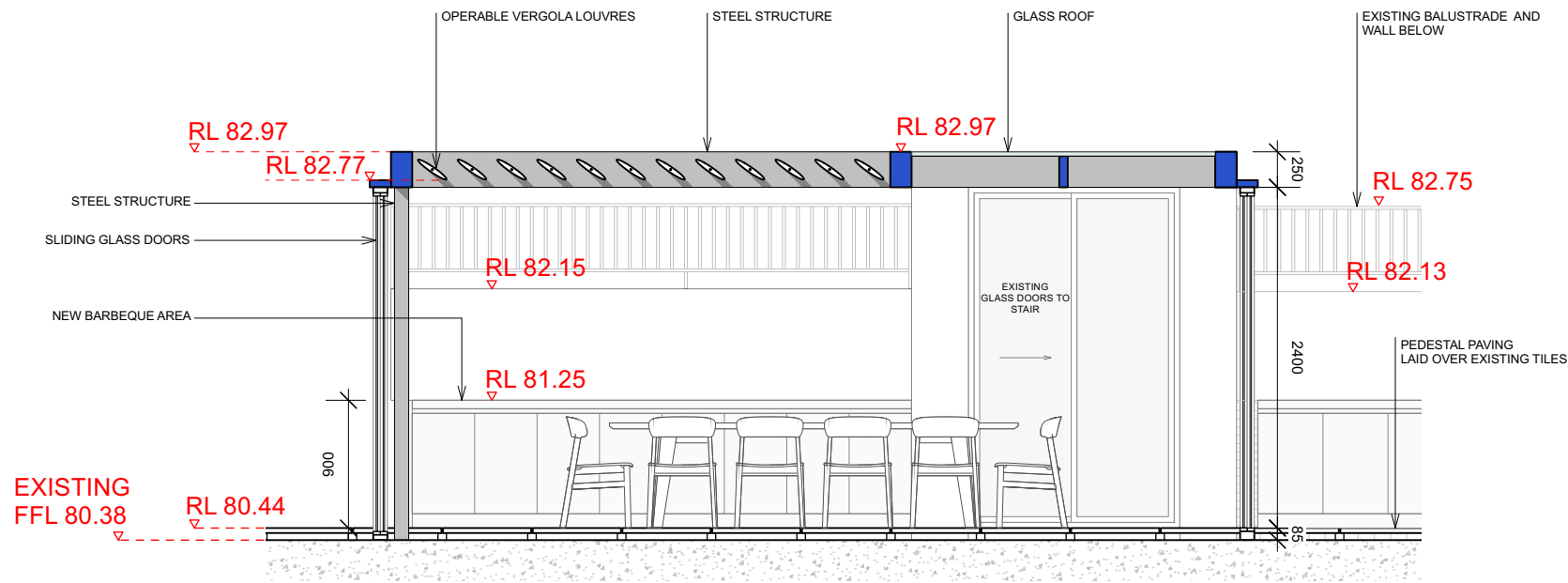
SOUTH ELEVATION



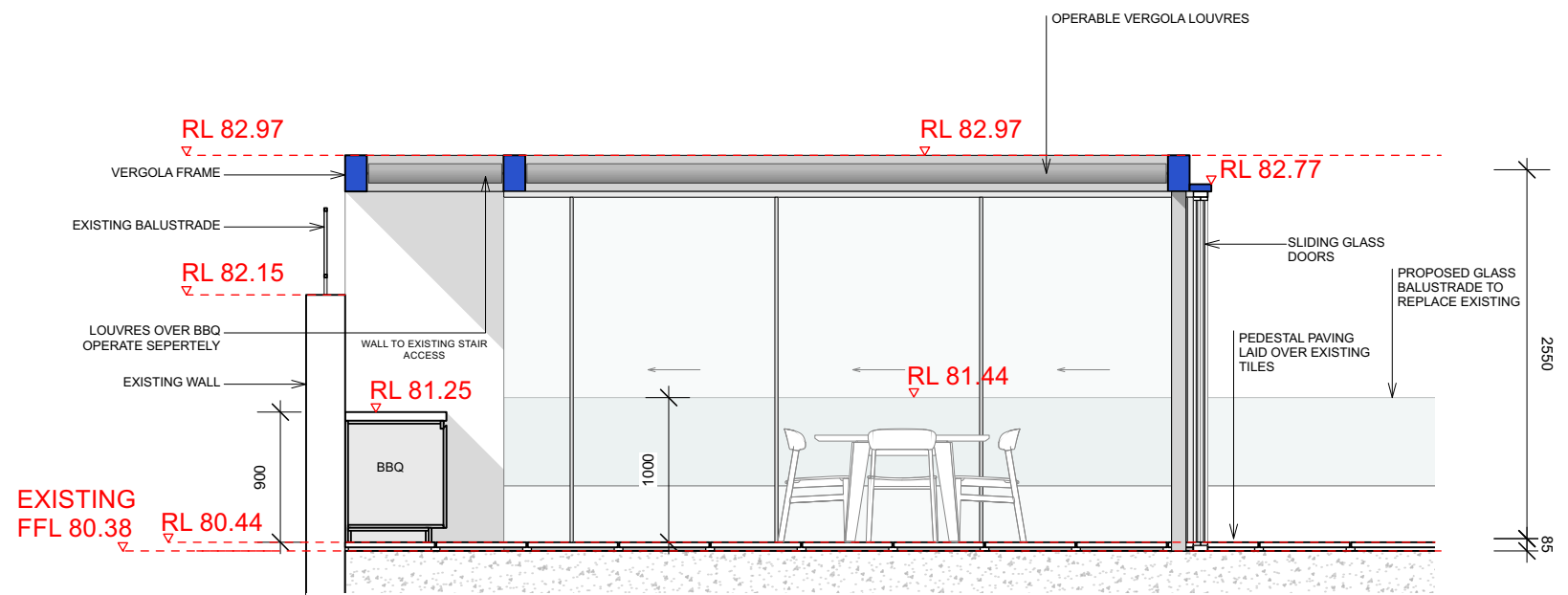
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SECTION 01



SECTION 02

DEVELOPMENT APPLICATION\_9/17 WYAGDON STREET, NEUTRAL BAY

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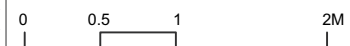
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**PROPOSED SECTIONS 01 & 02**

DATE. 21 NOVEMBER 2023  
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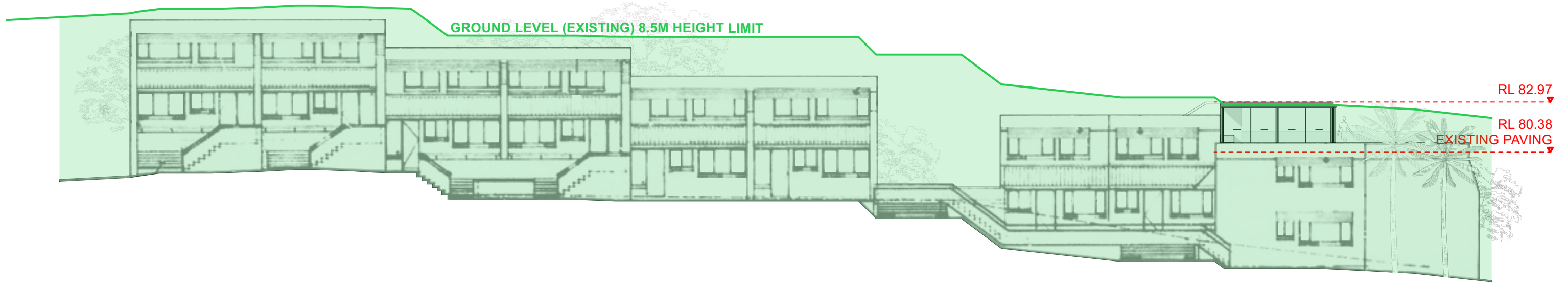
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**DA 05 A**

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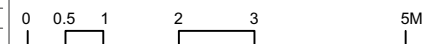
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**PROPOSED WEST ELEVATION**

DATE. 21 NOVEMBER 2023  
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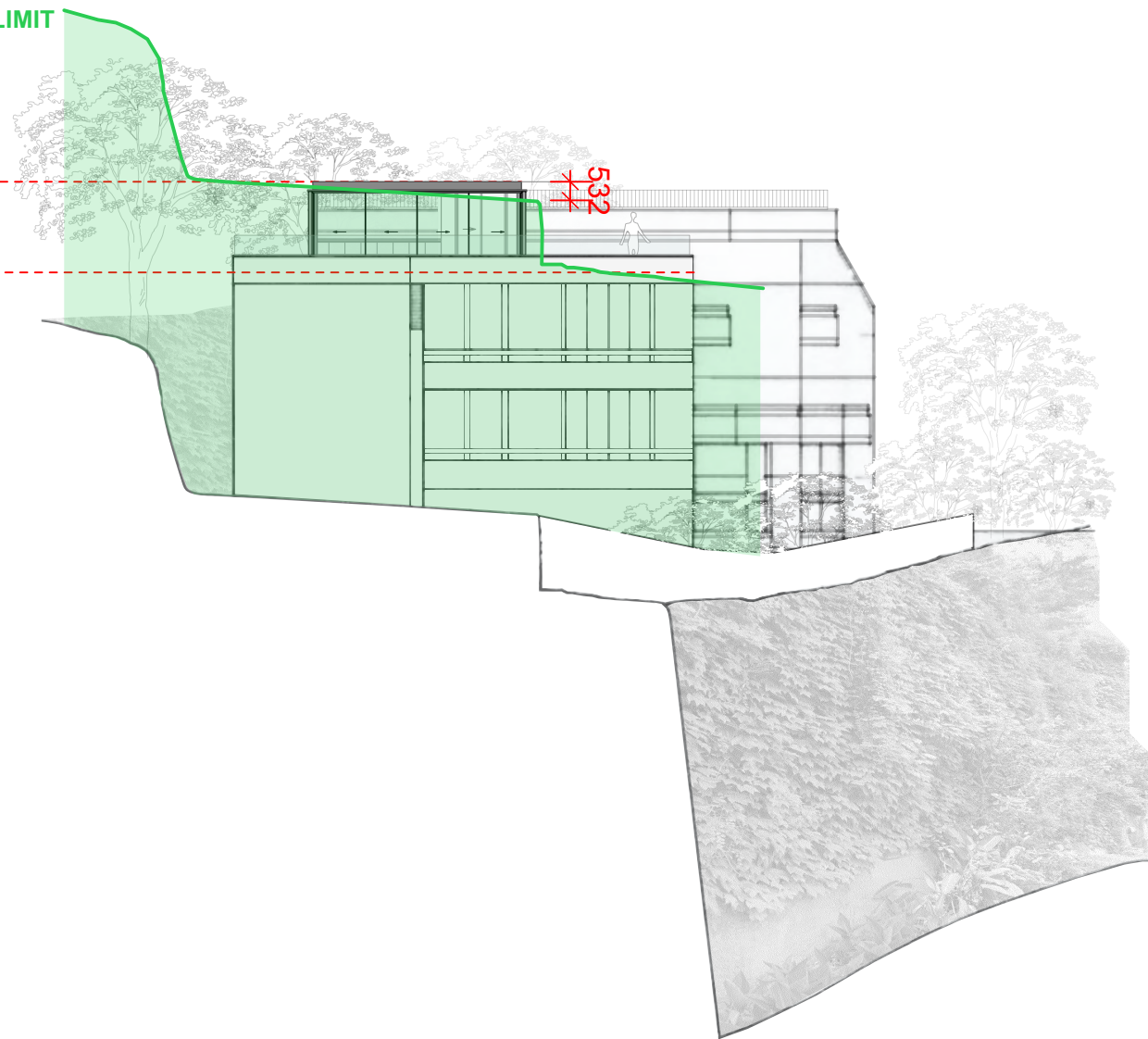
**DA 06 A**

REVISION.

GROUND LEVEL (EXISTING) 8.5M HEIGHT LIMIT

RL 82.97

RL 80.38  
EXISTING PAVING



DEVELOPMENT APPLICATION\_9/17 WYAGDON STREET, NEUTRAL BAY

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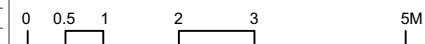
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**PROPOSED SOUTH ELEVATION**

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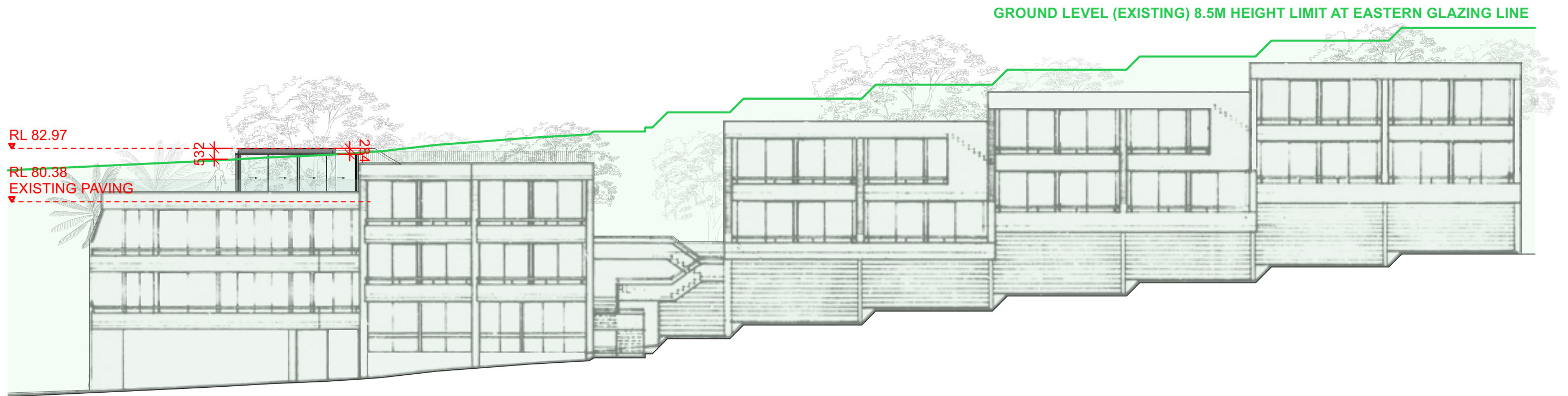
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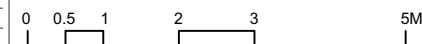
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**PROPOSED EAST ELEVATION**

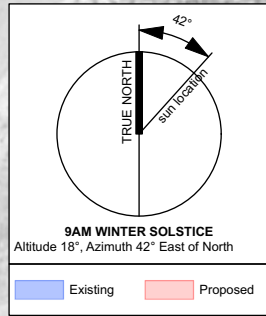
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REVISION.



DEVELOPMENT APPLICATION \_\_ 9/17 WYAGDON STREET, NEUTRAL BAY

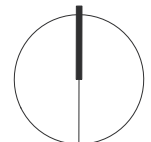
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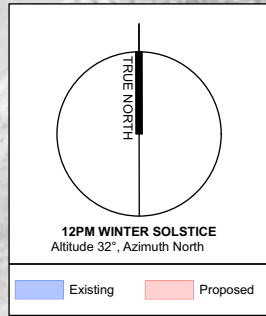


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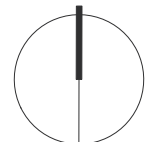
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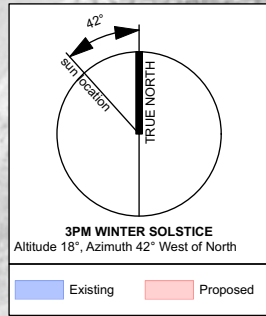
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DEVELOPMENT APPLICATION \_\_ 9/17 WYAGDON STREET, NEUTRAL BAY

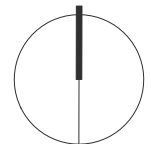
NOTE. All work to comply with Building Code of Australia, requirements of relevant Statutory Authorities & Local Government & relevant Australian Building Standards. Builder to ensure compliance with all Work Cover requirements. Check all timber sizes with a Structural Engineer and have all structural steelwork & concrete work designed by a Structural Engineer. When proprietary products are referred to, install in accordance with the manufacturers written instructions. Check all dimensions on site prior to construction. If in doubt, check with Architect. All discrepancies and omissions to be reported to Architect.

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**DA 11 A**

REVISION.

**COSO**  
ARCHITECTURE

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STEEL STRUCTURAL ELEMENTS



OPERABLE LOUVRES



PEDESTAL PAVING



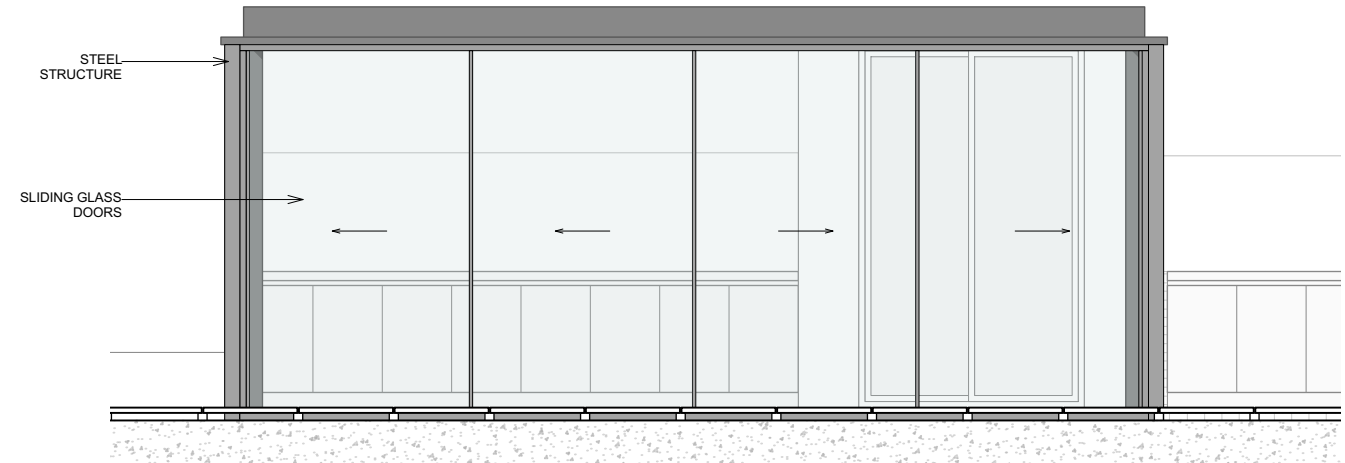
GLASS ROOF



GLASS DOORS



WESTERN ELEVATION  
1:50



SOUTH ELEVATION  
1:50

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ARCHITECTURE

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DEVELOPMENT APPLICATION \_\_9/17 WYAGDON STREET, NEUTRAL BAY

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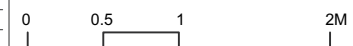
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**MATERIALS AND FINISHES**

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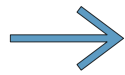


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**STORMWATER MANAGEMENT NOTES**

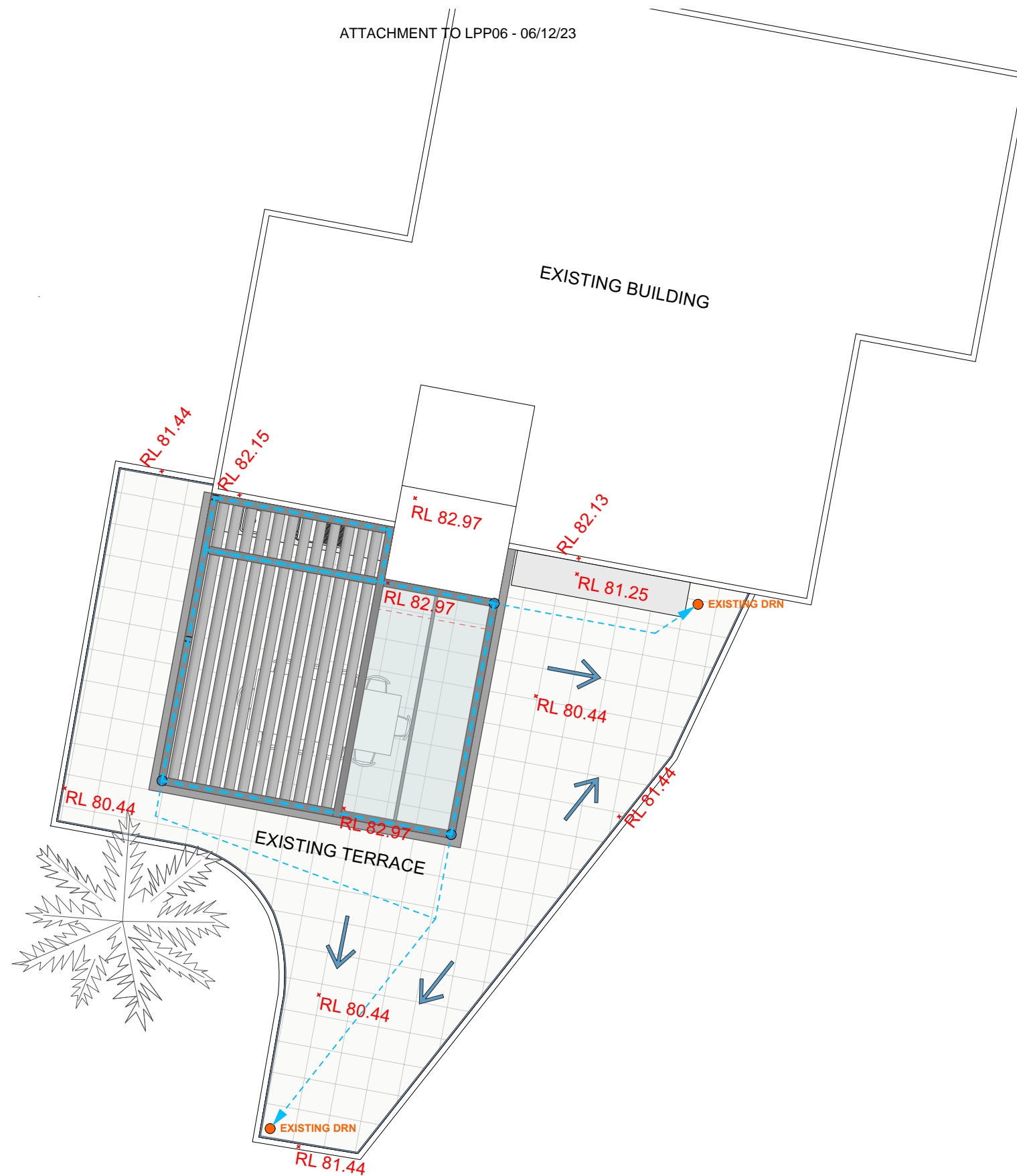


DIRECT RUN-OFF FROM  
HARDSURFACES TO  
EXISTING GUTTER &  
DOWNPIPES

- 1) Natural ground fall retained where possible to facilitate stormwater run-off collection via gravity.
- 2) Finished ground surfaces around dwelling to be generally graded away from building to avoid low points where water can accumulate.
- 3) Shrubs & low lying vegetation help to stabilise land during storms & freak flooding.
- 4) Connect stormwater to Sydney Water System via kerb and gutter system.
- 5) Stockpiles located upslope away from drainage lines throughout construction.
- 6) Use blue metal wrapped geotextile fabric or sandbags to filter stormwater run-off to street gutters.



PROPOSED STORMWATER  
CONNECTION



DEVELOPMENT APPLICATION\_9/17 WYAGDON STREET, NEUTRAL BAY

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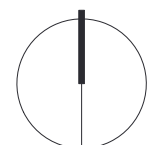
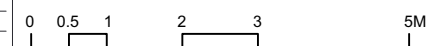
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**STORMWATER MANAGEMENT PLAN**

DATE. 21 NOVEMBER 2023  
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**DA 13 A**







REVISION.

**COSO**  
ARCHITECTURE

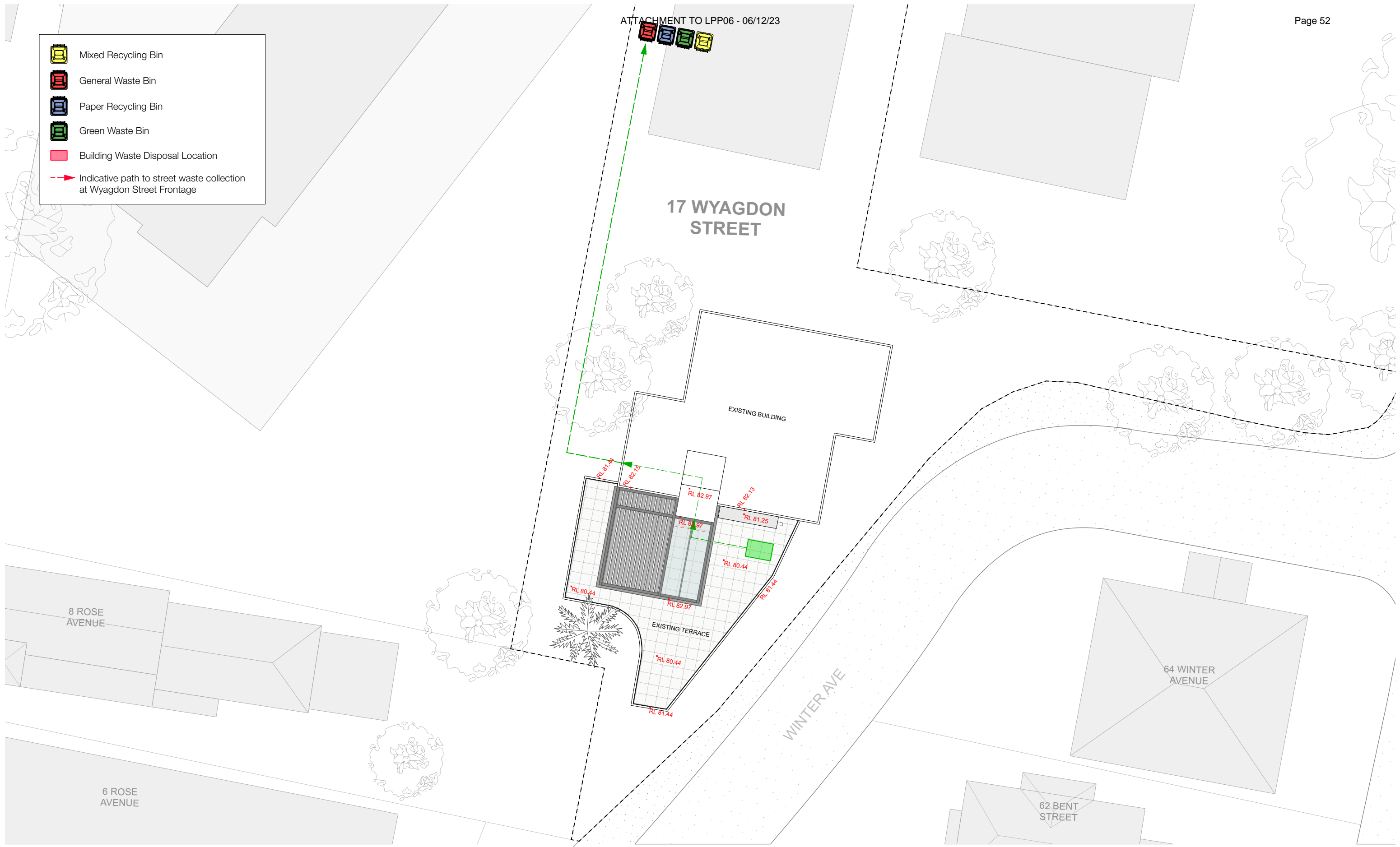
Paul Connor RAIA#7058 Anthony Solomon RAIA#5684  
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ATTACHMENT TO LPP06 - 06/12/23



-  Mixed Recycling Bin
-  General Waste Bin
-  Paper Recycling Bin
-  Green Waste Bin
-  Building Waste Disposal Location
-  Indicative path to street waste collection at Wyagdon Street Frontage

## 17 WYAGDON STREET



DEVELOPMENT APPLICATION 9/17 WYAGDON STREET, NEUTRAL BAY

NOTE. All work to comply with Building Code of Australia, requirements of relevant Statutory Authorities & Local Government & relevant Australian Building Standards. Builder to ensure compliance with all Work Cover requirements. Check all timber sizes with a Structural Engineer and have all structural steelwork & concrete work designed by a Structural Engineer. When proprietary products are referred to, install in accordance with the manufacturers written instructions. Check all dimensions on site prior to construction. If in doubt, check with Architect. All discrepancies and omissions to be reported to Architect.

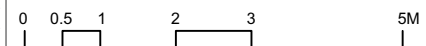
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**WASTE MANAGEMENT PLAN**

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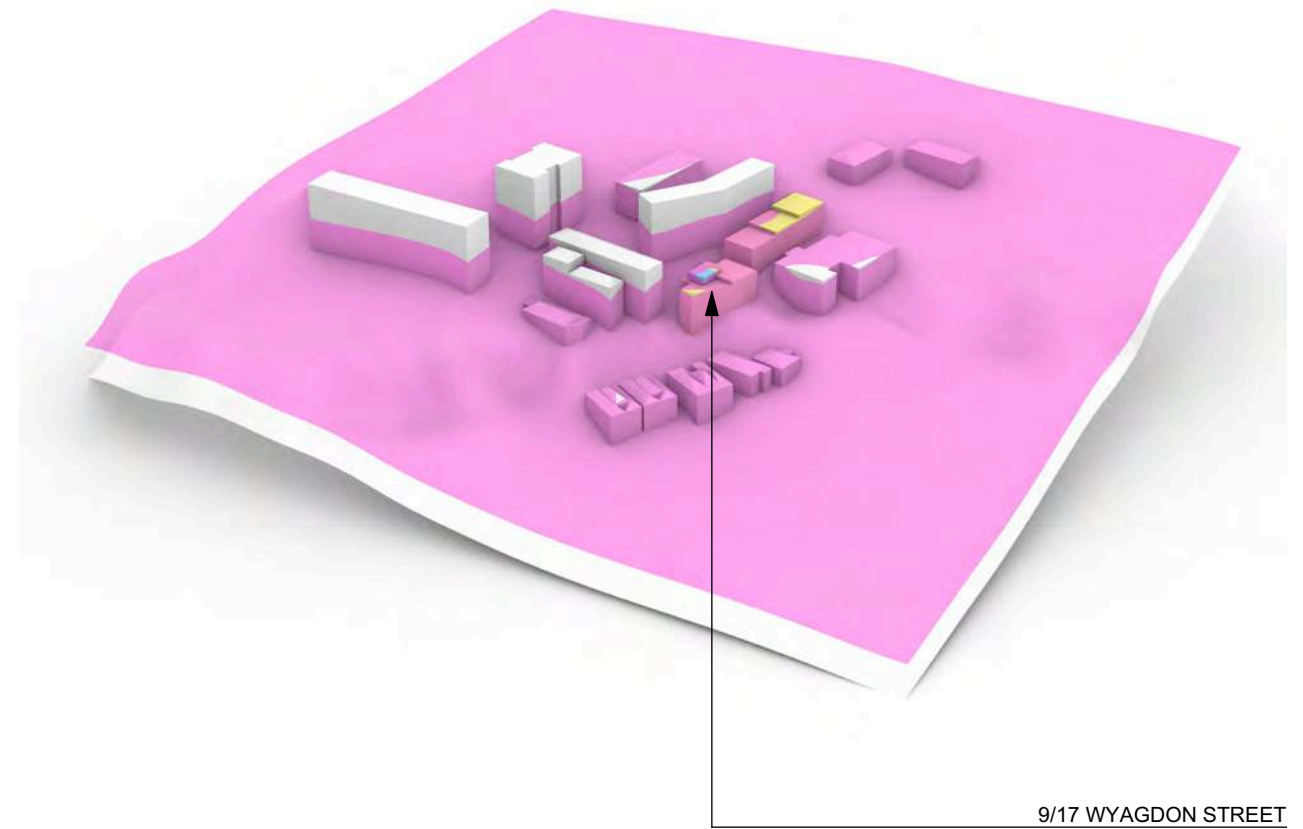
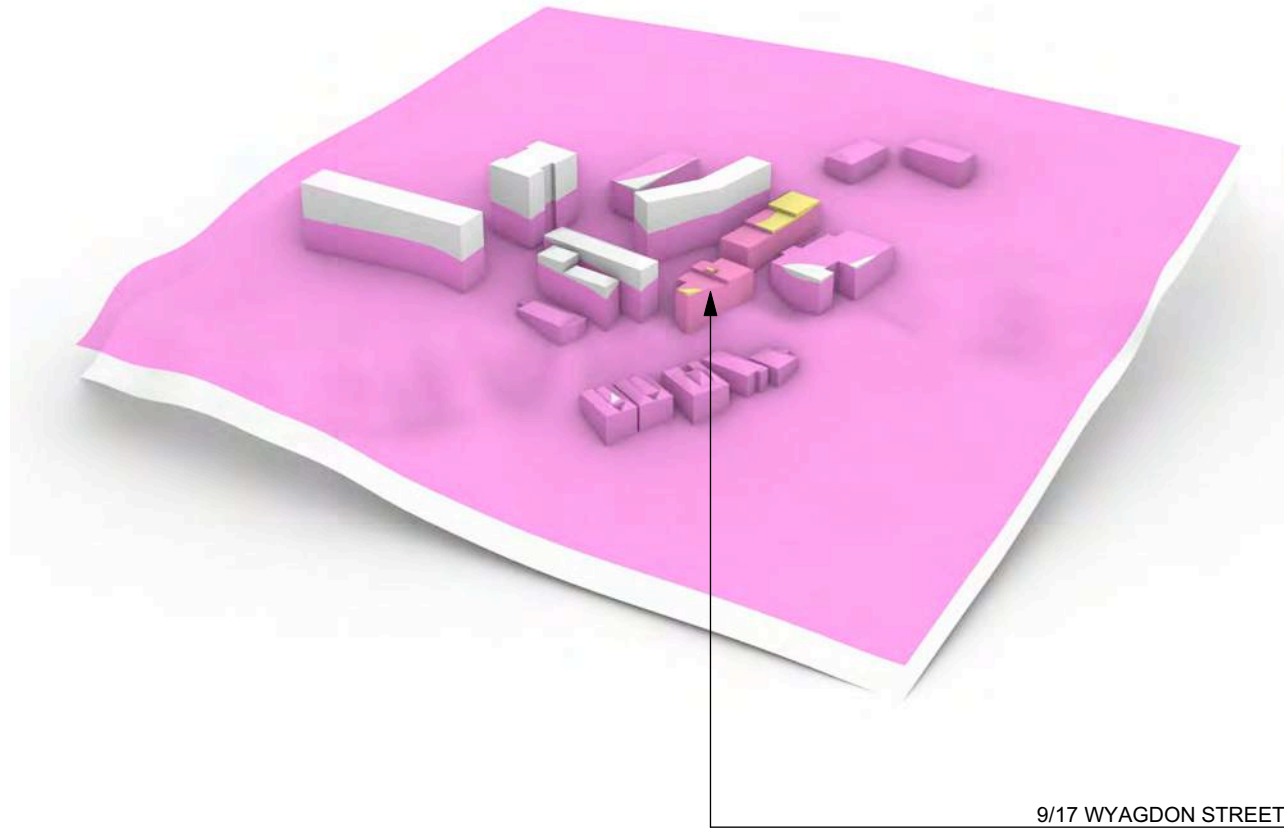
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**DA 14 A**

REVISION.



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**EXISTING**

**PROPOSED**

**LEGEND**

- 8.5 M HEIGHT BLANKET
- EXISTING BUILDING AT 17 WYAGDON STREET EXCEEDING 8.5M HEIGHT LIMIT
- PROPOSED BUILDING AT 17 WYAGDON STREET EXCEEDING 8.5M HEIGHT LIMIT

**DEVELOPMENT APPLICATION\_ 9/17 WYAGDON STREET, NEUTRAL BAY**

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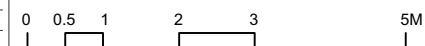
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**HEIGHT BLANKET**

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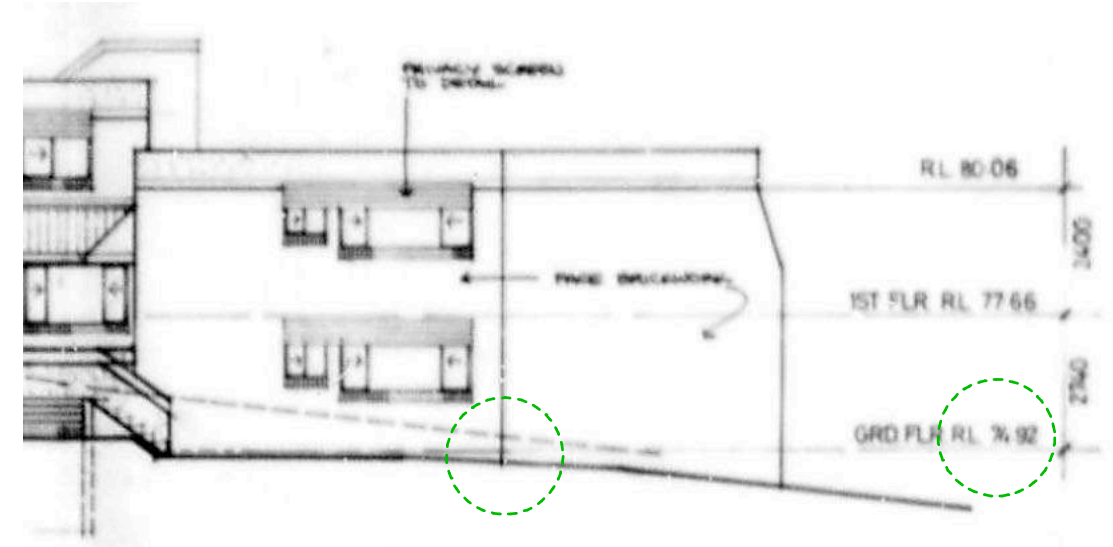
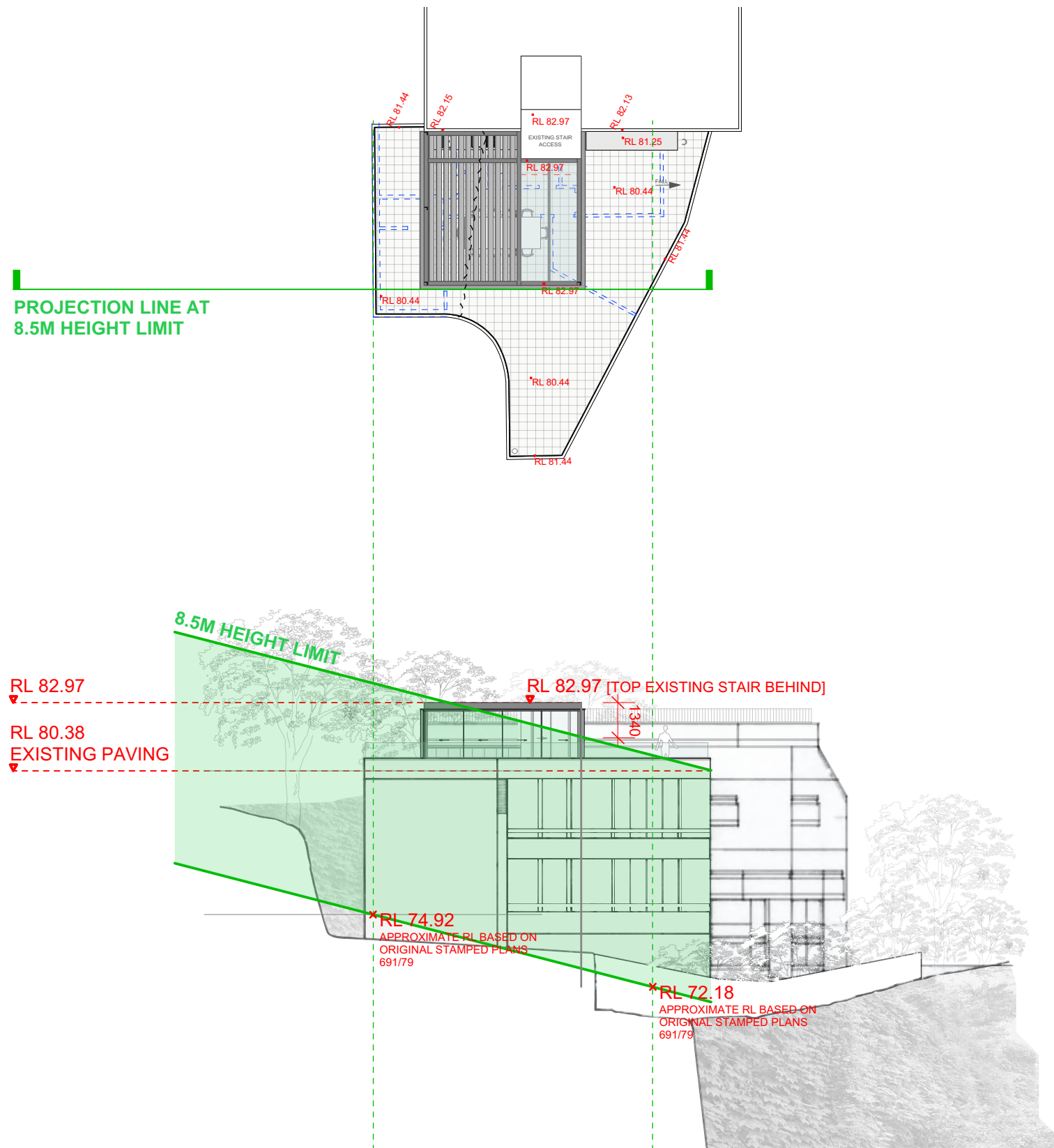
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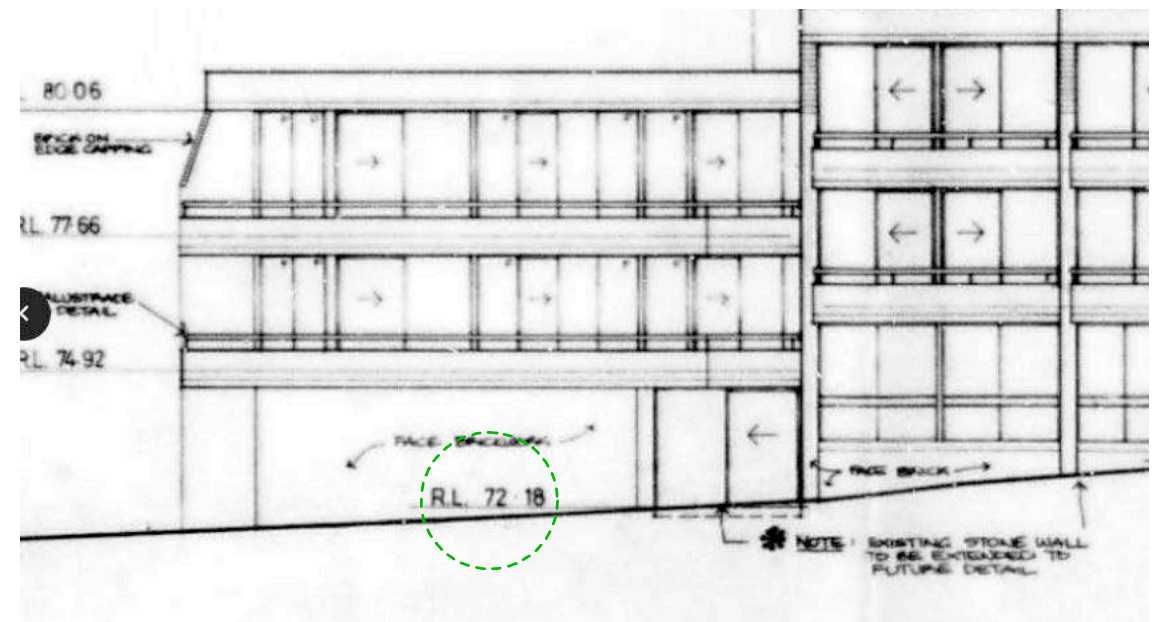
REVISION.

**COSO**  
ARCHITECTURE

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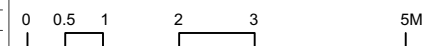


**WEST ELEVATION SHOWING GROUND FLOOR RL @ 74.92**  
 SOURCE: ORIGINAL STAMPED PLANS 691/79 (SEE APPENDIX A)  
 N.T.S



**EAST ELEVATION SHOWING GROUND FLOOR RL @ 72.18**  
 SOURCE: ORIGINAL STAMPED PLANS 691/79 (SEE APPENDIX A)  
 N.T.S

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Suite 1 No.9 Narabang Way Belrose NSW 2085 • acn 121 577 768  
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**Boston**BlythFleming  
Town Planners

**Clause 4.6 variation - Height of buildings (clause 4.3 NSLEP 2013)  
Alterations and additions to an existing residential flat building  
9/17 Wyagdon Street, Neutral Bay  
23.11.23**

## **1.0 Introduction**

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

This clause 4.6 variation request has been prepared in relation to Architectural plans Revision A prepared by Coso Architecture.

## **2.0 North Sydney Local Environmental Plan 2013**

### **2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of North Sydney Local Environmental Plan 2013 (NSLEP) the height of a building on the subject land is not to exceed the height shown on the height of buildings map. In the case of the subject land, the height shown on the map is 8.5 metres.

The objectives of this standard are as follows:

- (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) *to promote the retention and, if appropriate, sharing of existing views,*
- (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) *to ensure compatibility between development, particularly at zone boundaries,*

- (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*
- (g) *to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.*

Building height is defined as follows:

***building height (or height of building)*** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like

Ground level existing is defined as follows:

***ground level (existing)*** means the existing level of a site at any point.

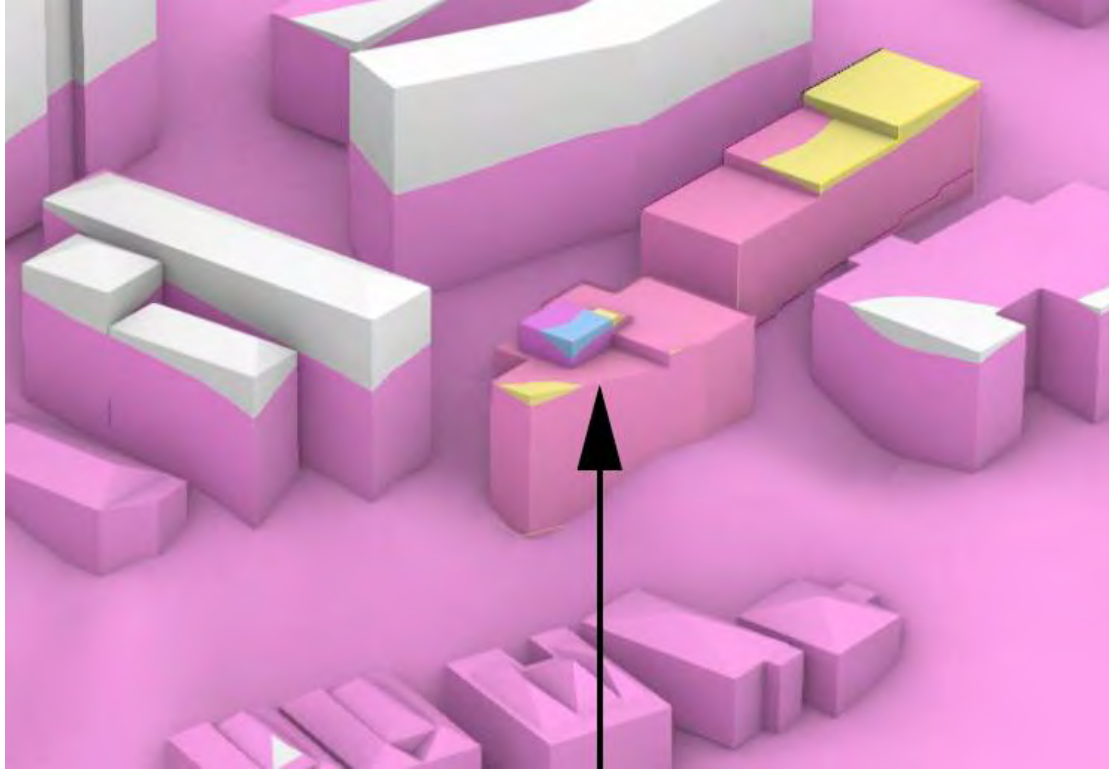
I note that that Council has adopted the interpretation of ground level (existing) as that established in the matter of *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* where at paragraphs 73 and 74 O'Neill C found:

- 73. *The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.*
- 74. *The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.*

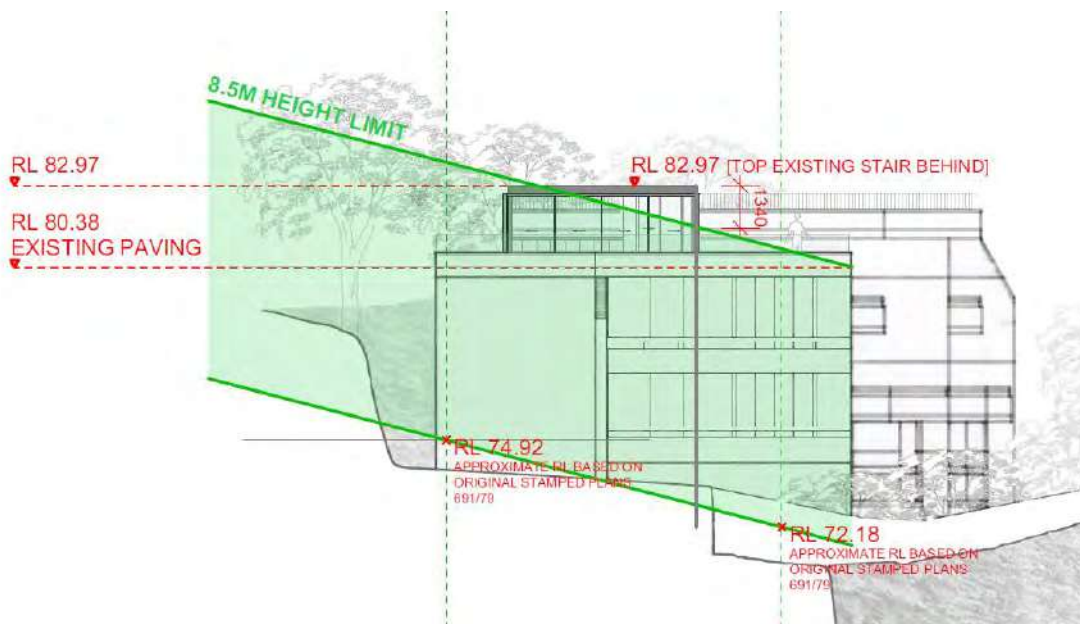
It has been determined that the eastern portion of the proposed structure breaches the height of buildings standard by a maximum of 1.34 metres or 15.7% as depicted in the following images.



Ground level (existing) within the inaccessible building footprint has been determined from levels obtained from the original stamped approved plans BA 691/79 and to that extent I am confident in relation to accurately identifying extent of building height breach.



**Image 1: 8.5m height blanket shown in purple with extent of building height breaching element in blue**



**Image 2: Elevation showing extend of building height breach at building facade**

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of NSLEP provides:

- (1) *The objectives of this clause are:*
- (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of NSLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.3 Height of Buildings Development Standard.

Clause 4.6(3) of NSLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

The proposed development does not comply with the height of buildings provision at 4.3 of NSLEP which specifies a maximum building height however strict compliance is considered to be both unreasonable and unnecessary in the circumstances of this case. There are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant analysis is set out later in this written request.

Clause 4.6(4) of NSLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest **because** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2021*, the Secretary has given written notice dated 5<sup>th</sup> May 2020, attached to the Planning Circular PS 20-002 issued on 5<sup>th</sup> May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice. Clause 4.6(5) of NSLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of NSLEP from the operation of clause 4.6.

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51].*

*The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of NSLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of NSLEP?

#### **4.0 Request for variation**

##### **4.1 Is clause 4.3 of NSLEP a development standard?**

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

*(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3 prescribes height provisions that relate to certain development. Accordingly, clause 4.3 is a development standard.

#### **4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary**

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first way, which has been adopted in relation to all objectives, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

#### Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*

Comment: The building height breaching element is associated with a minor ancillary structure located at the upper level of an existing residential flat building which has been designed to step down the site in response to topography. The proposed works do not require any changes to the existing or natural landform and does not compromise the developments stepped building form relative to natural landform.

In this regard, I am satisfied that the development conforms to/ relates to and reflects natural/ pre-existing landforms/ ground levels and to that extent satisfies this objective notwithstanding the building height breaching elements proposed.

- (b) to promote the retention and, if appropriate, sharing of existing views,*

Comment: For the purpose of this objective, I have carried out an assessment of potential view loss associated with the non-compliant elements of the development from both the public and private domains.

In relation to public views, potential view impacts have been considered via site inspections and during such inspection I was unable to identify any public views which would be affected by the non-compliant building height breaching elements of the proposed development.

In relation to private views, it has also been determined that no view impacts are present with regard to the non-compliant elements of the proposal. The appropriate sharing of existing views is maintained notwithstanding the non-compliant building height elements proposed. The proposal is consistent with this objective notwithstanding the non-compliance,

- (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*

Comment: The accompanying shadow diagrams depict the shadowing associated with the existing and proposed development at 9am, 12noon and 3pm on 21<sup>st</sup> June. The shadow diagrams demonstrate that whilst there is a small portion of additional shadowing onto adjoining properties at 9am that a minimum of 3 hours of solar access will be maintained to the windows of main internal living areas and the adjacent principal private open space areas of all surrounding properties between 9am and 3pm on 21<sup>st</sup> of June in strict accordance with clause 1.3.7 – Solar access of North Sydney Development Control Plan 2013.

Notwithstanding the building height breaching elements, the proposal maintains reasonable solar access to existing dwellings, maintains solar access to public reserves and streets, and promotes solar access for future development. Accordingly, the proposal complies with this objective.

- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*

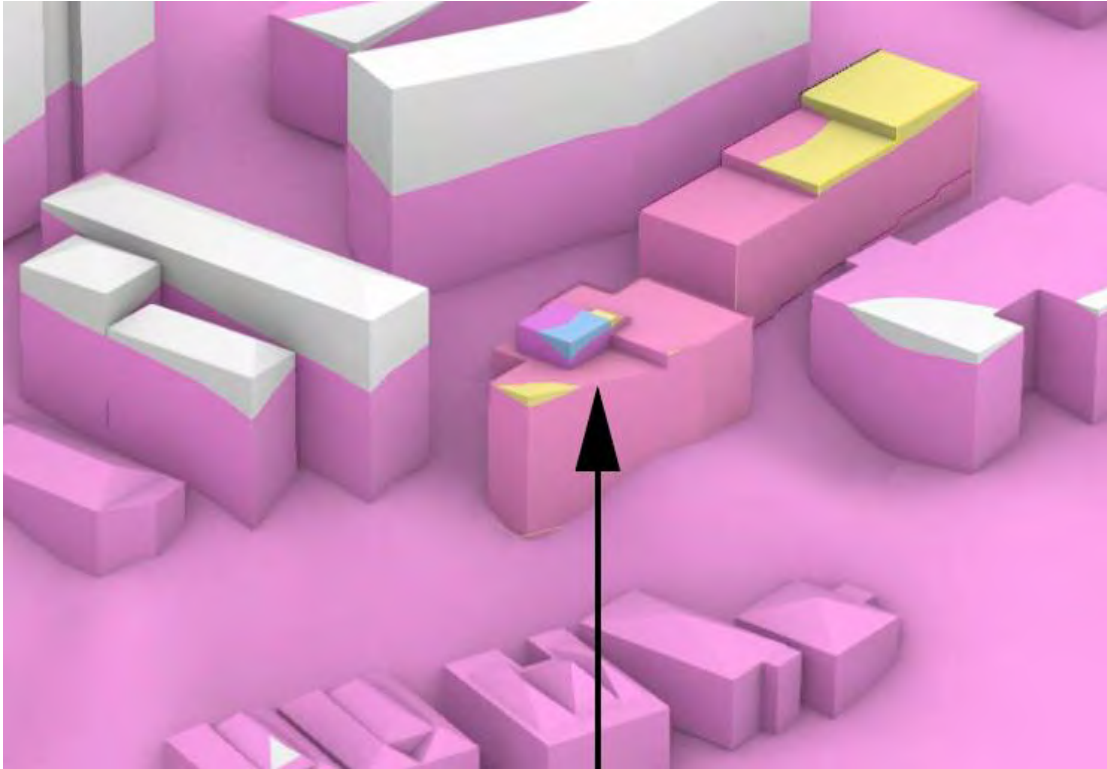
Comment: Having reviewed the plans in the context of the juxtaposition of adjoining residential development I am satisfied that the building height breaching element will not give rise to adverse visual or aural privacy impacts to any surrounding residential property nor compromise the privacy of future occupants of the proposed development.

Notwithstanding the building height breaching elements the proposal is consistent with this objective.



- (e) *to ensure compatibility between development, particularly at zone boundaries,*

Comment: The R2 zoned site adjoins R4 High Density Residential zone. The height blanket drawing below provides context as to the compatibility of the development with regard to the height of surrounding development.



**Image 3: Contextual analysis – existing Surrounding Development**

The non-compliant component of the proposed development would not contribute to building height, bulk or scale to the extent that the structure would be considered jarring or out of place within the context of existing development in the immediate vicinity. The existing bulk and scale of the building is not significantly altered by virtue of the proposed structure to the extent that the resultant building form would be incompatible with surrounding development particularly development located in the adjacent R4 High Density Residential zone. This objective is achieved notwithstanding the building height non-compliant elements proposed.

- (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

Comment: The subject site is located within the Forsyth Neighbourhood in the Neutral Bay Planning Area.

I have formed the considered opinion that the proposed development is consistent with the Desired Future Character for the precinct given that the inclusion of a pergola will not significantly alter bulk and scale of the building generally. The proposed structure, in particular the non-compliant building height elements, are stepped in further from the eastern building parapet reducing the ability for it to be seen when viewed from the public domain.

I have also formed the considered opinion that the height, form, massing and setbacks of the proposed development are complimentary and compatible with the existing character of development established on the site and within the sites visual catchment. The proposal is consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its height, footprint and setbacks offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the sites visual catchment.

Having regard to the above, the non-compliant building height component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard.

- (g) *to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.*

Comment: The proposal does not change the existing number of storeys. This objective is achieved notwithstanding the building height non-compliance proposed.

#### Consistency with zone objectives

The subject site is zoned R2 Low Density Residential pursuant to the provisions of NSLEP. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.*

- *To ensure that a high level of residential amenity is achieved and maintained.*

I consider the development to be consistent with the zone objectives as follows:

***To provide for the housing needs of the community within a low density residential environment.***

Response: The existing residential density is maintained on the site notwithstanding the building height breaching elements proposed.

***To enable other land uses that provide facilities or services to meet the day to day needs of residents.***

Response: The building height breaching elements will not inhibit the development of other permissible land uses within the R2 low Density residential zone. This objective is achieved notwithstanding building height breaching elements proposed.

***To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.***

Response: The proposed does not alter the existing provision of dwellings within the building. No amenity impacts are identified with regard to the breaching element of the proposal.

***To ensure that a high level of residential amenity is achieved and maintained.***

Response: As previously indicated, the breaching element of the proposal does not give rise to any unreasonable amenity impacts with regard to solar access, privacy or view loss.

Accordingly, the consent authority can be satisfied that the proposal is consistent with the R2 low Density Residential zone objectives. Under such circumstances, the proposal is not antipathetic to the objectives as outlined notwithstanding the building height breaching elements proposed.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the R2 low density residential zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be unreasonable and unnecessary.

#### **4.2B Clause 4.6(3)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].*

#### **Sufficient Environmental Planning Grounds**

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

#### **Ground 1 – Minor nature of breach and topography**

The extent of building height breach is confined to the eastern edge of the proposed structure with the extent of breach exacerbated by the irregular topography of the land. The building height breaching elements are quantitatively and qualitatively appropriately described as minor.

Consistent with the findings of Commissioner Walsh in *Eather v Randwick City Council* [2021] NSWLEC 1075 and Commissioner Grey in *Petrovic v Randwick City Council* [202] NSW LEC 1242, the particularly small departure from the actual numerical standard and absence of impacts consequential of the departure constitute environmental planning grounds, as it promotes the good design and amenity of the development in accordance with the objects of the EP&A Act.

## **Ground 2 - Objectives of the Act**

### Objective (c) to promote the orderly and economic use and development of land

For the reasons outlined in this submission, approval of the variation to the building height standard will promote the orderly and economic use by enabling minor works to improve the amenity of the existing terrace by providing all season weather protection. Strict compliance would compromise the amenity of the existing private open space. Approval of the building height variation will achieve this objective.

### Objective (g) to promote good design and amenity of the built environment

For the reasons outlined in this submission, approval of the variation to the building height standard will promote good contextually appropriate design and facilitate enhanced design quantity and amenity outcomes for the development. Approval of the building height variation will achieve this objective.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test.*

*The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.*

There are sufficient environmental planning grounds to justify contravening the development standard.

#### **4.3 Clause 4.6(4)(a)(ii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the zone**

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development’s consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.*

*If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

#### **4.4 Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?**

By Planning Circular dated 5<sup>th</sup> May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and

- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

**4.5 Has the consent authority considered the matters in clause 4.6(5) of NSLEP?**

- (a) The proposed non-compliance does not raise any matter of significance for State or regional environmental planning as it is peculiar to the design of the proposed development and for the particular site and this design is not readily transferrable to any other site in the immediate locality, wider region of the State and the scale or nature of the proposed development does not trigger requirements for a higher level of assessment.
- (b) As the proposed development is in the public interest because it complies with the objectives of the development standard and the objectives of the zone there is no significant public benefit in maintaining the development standard.
- (c) there are no other matters required to be taken into account by the secretary before granting concurrence.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

**Boston Blyth Fleming Pty Limited**

**Greg Boston**  
B Urb & Reg Plan (UNE) MPIA  
**Director**